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OF

THE DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

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FROM JANUARY 1, 1894, TO JUNE 30, 1894.

VOLUME XVIII.

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

TIMBER CULTURE ENTRY—COMMUTATION.

HENRY L. SHUTE.

The heir of a deceased timber culture entryman is not entitled to submit commutation proof under section 1, act of March 3, 1891, if he is not a resident of the State in which the land is situated.

First Assistant Secretary Sims to the Commissioner of the General Land Office, January 10, 1894.

This case involves the SE. $\frac{1}{4}$, Sec. 13, T. 153 N., R. 62 W., Grand Forks land district, North Dakota.

The record shows that George L. Shute filed a timber-culture application December 13, 1883.

On October 14, 1889, he died and on April 27, 1892, Henry L. Shute, his father and heir, made commutation proof, which was rejected by the local officers for the reason that the said Henry L. Shute was not a *bona fide* resident of the State of North Dakota.

Upon appeal your office decision of September 2, 1892, was rendered and the decision appealed from was sustained. Upon further appeal the case is here for final adjudication.

No question is raised as to the sufficiency of the proof; presumably it was satisfactory. The only question in the case is: Can an heir of a deceased entryman, not a resident of the State in which the land lies, make commutation proof.

The section of the act of March 3, 1891, relating to this question is as follows:

That any person who has made entry of any public lands of the United States under the timber-culture laws, and who has for a period of four years in good faith complied with the provisions of said laws and who is an actual *bona fide* resident of the State or Territory in which said land is located shall be entitled to make final proof thereto, and acquire title to the same, by the payment of one dollar and twenty-five cents per acre for such tract.

This Department has construed this section in the case of *ex parte* Frank E. Wright (16 L. D., page 322), in which Assistant Secretary Chandler held that "the administrator of the estate of a deceased timber-culture entryman can not commute the entry of the decedent for the benefit of an heir who is not a resident of the State in which the land is situated."

As the entryman is only allowed to make commutation proof when a resident of the State in which the land lies, his heir can occupy no higher ground or successfully assert any more privileges than the person through whom he claims.

It therefore follows that your office decision is correct as to the matter of law raised. But following the additional rule laid down in the *ex parte* case, *supra*, where the Assistant Secretary says— "The entry will remain intact subject to compliance with the requirements of the law by either the administrator or the heir" the entry will remain of record in order to permit the appellant to comply with the law. Your office decision is therefore accordingly affirmed.

TIMBER CULTURE CONTEST—AFFIDAVIT OF CONTEST.

SILVERIA *v.* PAUGH.

The allegations in an affidavit of contest will not be held insufficient if the charges therein, taken together, set forth a state of facts that warrant cancellation.

First Assistant Secretary Sims to the Commissioner of the General Land Office, January 10, 1894.

On February 10, 1885, William J. Paugh made timber culture entry of SE. $\frac{1}{4}$ of Sec. 34, T. 5 S., R. 2 E., M. D. M., San Francisco land district, California.

On December 29, 1890, Antonia Silveria filed affidavit of contest, alleging that the said Paugh "has not cultivated or planted trees on said land, as required by law, and that it is not subject to entry under the timber culture act, there now being timber on the land."

On this affidavit of contest the local officers ordered a hearing; the parties appeared, and defendant moved that the contest be dismissed, on the grounds stated in his motion. This motion was overruled, defendant excepted, and the trial took place. The local officers held defendant's entry for cancellation, and he appealed. Your office affirmed said decision.

There is nothing in the jurisdictional objections; but the objections to the affidavit of contest are more difficult to be disposed of.

Clearly, the first charge taken by itself is too general to hang a contest on. But the charge that "the land is not subject to entry under the timber culture act, there now being timber on the land," construed

in connection with the preceding charge, seems to be a sufficient allegation that there was timber growing on the land at the time of claimant's entry;—it being first charged that claimant *has not planted trees*, and then, that there is *now timber on said land*. If it is charged that there is timber on the land, and claimant has planted no trees, surely, that is tantamount to a charge that there was timber thereon at the time claimant made entry.

It is impossible not to concur in the judgment of the local officers and of your office, that the evidence shows that there was a natural growth of timber, consisting of sycamore, live oak and other forest trees, to a considerable extent, on the section, and on the tract covered by this entry. Consequently, the section was not "devoid of timber" within the meaning of the statute.

The judgment of your office, holding said entry for cancellation, is affirmed.

SETTLEMENT RIGHT—HOMESTEAD—ABANDONMENT.

NEAL *v.* COOLEY.

Settlement on a tract covered by the entry of another confers no right as against the record entryman or the United States.

A charge of abandonment against a homestead entry must fail where the entryman is residing upon the land when notice of the contest is served.

First Assistant Secretary Sims to the Commissioner of the General Land Office, January 10, 1894.

This case involves the SW. $\frac{1}{4}$, Sec. 10, T. 16 S., R. 3 E., M. D. M., San Francisco land district, California.

The record shows that Frederick Cooley made homestead entry for this tract October 21, 1887.

On September 29, 1891, Francis M. Neal filed an affidavit of contest, alleging that Cooley had never resided upon the land or cultivated it from the date of entry up to the 15th of September, 1891, at which time the contestant, Neal, moved upon said land; and, further, that the said Cooley had never built a house thereon but had resided off the land with one Towt, in whose interest, it is also alleged, the entry was made.

By direction of the local officers the parties appeared and submitted their testimony before the clerk of Monterey county, California, on November 16, 1891.

On December 8, 1891, the register and receiver rendered their joint opinion, wherein they sustained the contest and held for cancellation the homestead entry of Cooley.

Upon appeal, your office decision of June 22, 1892, was made, over ruling that of the local officers and allowing the entry of Cooley to remain intact.

Neal appealed to this Department on September 1, 1892, alleging the decision to be in error on the following grounds:

1. In deciding that the claimant Cooley, after abandoning his homestead entry for four years and after the same was forfeited under the law, had any further rights in the premises.

2. In overruling the local office, which decided that Cooley's homestead entry should be canceled because of abandonment, bad faith and failure to comply with the law as to residence and cultivation, all of which facts were proven at the trial.

Without passing upon all of the testimony here, it is sufficient for the purposes of this decision to state that the evidence shows that Neal made settlement on the land in dispute September 15th, 1891. On the same day the defendant commenced the construction of a house which he completed and moved into prior to the initiation of contest. He was thus living upon the land at the time the notice of contest was served upon him.

In *Kruger v. Dumbolton* (7 L. D., 212), it was said that while an entry stands of record, settlers on the tract covered thereby, can secure no right by virtue of such settlement as against the record entryman or the United States; and the same is again set forth in *Hall v. Levy* (11 L. D., 284). Cooley was living upon the land when the contest was initiated, and he had cured his laches as far as this contest was concerned, because the settlement alone did not give Neal any rights as against the record entryman; if he had filed his contest prior to the defendant moving upon the land, his rights would have attached then, but having abandoned his charge that the entry was speculative, it follows that the charge of abandonment can not prevail.

It therefore follows that the decision appealed from was correct, and the same is hereby affirmed.

ARID LANDS—RESERVOIR SITE.

NEWTON F. AUSTIN.

An entry after the passage of the act of October 2, 1888, of land subsequently designated as a reservoir site under said act is invalid, but may be suspended with a view to its ultimate allowance under section 17, act of March 3, 1891, in the event that the land is not required for reservoir purposes.

First Assistant Secretary Sims to the Commissioner of the General Land Office, January 10, 1894.

The land involved in this appeal is said to be "what will be when surveyed the NW. $\frac{1}{4}$, NW. $\frac{1}{4}$, Sec. 24, T. 15 S., R. 44 E.," Blackfoot, Idaho, land district.

It appears from the record that Newton F. Austin made desert land entry of said tract July 9, 1889, and on July 9, 1892, offered final proof, which was accepted by the local officers, and by your office approved October 7, 1892. Subsequently, however, it was discovered in your office

that the tract was "embraced in the selection of the Director of the Geological Survey for the Bear Lake reservoir site," made by him July 19, 1889. Your office, therefore, under date of December 3, 1892, held said entry for cancellation, whereupon Austin prosecutes this appeal, upon the ground that his entry having been made July 9, 1889, and the selection by the Director of the Geological Survey not having been made until July 19 following, his right is the prior one, and can not be affected by the reservation.

This position is not tenable. The act of Congress (25 Stat., 526), reserving lands for reservoirs, canals, ditches, etc., for irrigation purposes, reads as follows—

And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches, or canals for irrigation purposes and all lands made susceptible of irrigation by such reservoirs, ditches, or canals are from henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act to entry, settlement, or occupation until further provided by law: *Provided*, that the President at any time in his discretion, by proclamation, may open any portion or all of the lands reserved by this provision to settlement under the homestead laws.

The Hon. Attorney-General, in construing this act of Congress, in an opinion dated May 27, 1890 (see 11 L. D., 220), among other things, says—

There can be no question that if an entry was made upon land which was thereafter designated in a United States survey as a site for a reservoir, or which was by such reservoir made susceptible of irrigation, the entry would be invalid, and the land so entered upon would remain the property of the United States, the reservation thereof dating back to the passage of this act.

The entry in question having been made after the passage of said act, it follows that the entryman acquired no rights under his entry. (Mary E. Bisbing, 13 L. D., 45.)

The act of October 2, 1888, *supra*, was amended by the act of March 3, 1881 (26 Stat., 1095), by which it was provided that reservoir sites located

shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding so far as practicable land occupied by actual settlers at the date of the location of said reservoirs.

Following the rule announced in the Bisbing case, *supra*, I see no reason why this entry may not be suspended to await the further action of the proper authorities, in the matter of the actual location of the reservoir, when, if it shall appear that the land is not required for that purpose, the entry may be completed.

Your said office judgment is thus modified.

APPLICATION TO ENTER.—SECOND CONTEST.

OWENS *v.* GAUGER.

Failure to appeal from the rejection of an application to enter does not defeat the right of the applicant, where he is not given the requisite notice in writing of the adverse action and of his right of appeal therefrom.

No rights are acquired under a second contest in the event that the entry is canceled as the result of the prior proceedings.

First Assistant Secretary Sims to the Commissioner of the General Land Office, January 10, 1894.

This case involves the NE. $\frac{1}{4}$ of Sec. 18, T. 105 N., R. 56 W., Mitchell land district, South Dakota. The record shows that this tract has been in controversy since 1885. The timber culture entry of one, Sheppard was held for cancellation upon the contest of one, Bunce, by your letter "H", of June 30, 1888.

On June 23, 1888, Henry Gauger filed a second contest, and on July 18, 1888, William J. Owens filed an application to enter, on which was endorsed

Tendered July 18, 1888, at 10 o'clock, a. m., and rejected upon the ground that the contest of Bunce *v.* Sheppard is now pending before the Department, and for the further reason that a contest of H. Gauger, filed June 23, 1888, is held to await final action on Bunce's pending contest.

M. H. ROWLEY,
Register.

Fourteen dollars tendered and rejected, and returned July 18, 1888.

F. F. SINGISER, *Receiver.*

But subsequently, on January 31, 1889, he was allowed to make timber-culture entry.

July 23, 1888, Henry Gauger filed his application to enter, which was refused by the local officers, and on appeal, their finding was sustained, but upon the case coming up to the Department, said decision was reversed, and it was held that the application should have been received, subject to the right of appeal in Sheppard, and the preference right of entry in Bunce. Henry Gauger (10 L. D., 221).

April 5, 1890, your office directed that if Bunce had failed, after due notice given, to exercise his preference right, then upon proper showing made, and upon payment, Gauger's application should be allowed, and upon report of that fact the timber culture entry of William J. Owens, of January 31, 1889, would be canceled.

Henry Gauger was allowed to make timber culture entry May 13, 1890, and on January 8, 1889, William J. Owens made timber culture application to enter the said tract, and upon his application is endorsed, As this land has been covered by the contest of Bunce *v.* Sheppard, and canceled by letter "H", of November 17, 1888, due notice of which was given to Bunce, and of his preference right of entry for thirty days, on December 31, 1888, and as said contestant's preference right of entry does not expire until January 31, 1889,

said land is completely segregated from the public domain until that date, and in consequence, is not open to entry; this application is therefore rejected, with the right of appeal for thirty days.

JANUARY 8, 1889.

M. H. ROWLEY,

Register.

January 31, 1889, Owens was allowed to make timber culture entry, and this entry was canceled by letter "H", of April 5, 1890. On April 23, 1890, Owens filed a motion, praying a review in the case of Henry Gauger, (10 L. D., 221), which was denied by the Acting Secretary, who said:

The decision sought to be reviewed did not pass upon any rights Mr. Owens may have in the premises, and therefore cannot prejudice those rights, and he can as readily assert them in a proper manner now, as he could before said decision.

Upon this, on March 11, 1891, Owens filed in the local office an application for relief, setting forth that he was a prior applicant, and asking that Gauger's entry be canceled, and that his be reinstated.

On June 15, 1891, your office ordered a hearing to decide upon the merits of the case thus raised, and on August 13, 1891, the case came up for a hearing before the register and receiver, and on January 12, 1892, they rendered their joint opinion, and allowed the entry of Gauger to stand. From this decision Owens, on February 2, 1892, appealed, and by your office decision of April 4, 1892, the local officers were sustained.

On May 21, 1892, Owens appealed from said decision, alleging as his grounds of appeal:

First. He (you) erred in finding that Owens had notice of the rejection of his application made July 18, 1888, and of his right of appeal.

Second. He erred in taking as evidence counsel's statement of what he could prove by Attorney Adams.

Third. He erred in finding that Owens waived his right under his first application by appearing at the office to complete said filing or entry.

Fourth. He erred in finding that Gauger had the prior right of entry.

Fifth. He erred in affirming the decision of the local officers.

Sixth. He erred in finding contrary to the evidence and rules of the Department.

In taking up his first ground of appeal, it appears from the record and the evidence, that neither William J. Owens nor his attorney J. M. Adams, received written notice of the rejection of his application of July 18, 1888, nor of his right of appeal to you. The register explains that it was at that time the practice of the local officers at Mitchell, South Dakota, to personally inform the applicant, or his attorney, of the rejection, and then and there return the money offered. It further appears that at the trial of this cause the appellant Owens denied, whilst on the stand, that he had received any notice of the rejection of his application from the local officers, or from his attorney. The defendant, Gauger, through his attorney, sought to place the attorney of Owens on the stand, stating that he proposed to prove by him that he did have actual notice of the rejection of Owens' application. Mr. Adams refused to be sworn as a witness, saying, "he did not wish to make a case for claimant."

Admitting for sake of argument that Adams, Owens' attorney, did have actual knowledge of the rejection of the application of July 18, 1888, which is denied, what would the law be? Rule 66 of Practice is as follows:

For the purpose of enabling appeals to be taken from the rulings or action of the local officers, relative to applications to file upon, enter or locate the public lands, the following rules will be observed:

1. The register and receiver will endorse upon every rejected application the date when presented, and their reasons for rejecting it.
2. They will promptly advise the party in interest of their action, and of his right of appeal to the Commissioner.
3. They will note upon their records a memorandum of the transaction.

Rule 17 of Practice says:

Notice of interlocutory motions, proceedings, orders and decisions shall be in writing, and may be served personally, or by registered letter through the mail to the last known address of the party.

In the case of *Elliott v. Neal* (4 L. D., 73), it was held that "a motion to dismiss an appeal because not filed in time, will not be entertained where it appears that the appellant did not have written notice of the adverse decision." Again, in *Churchill v. Seeley* (4 L. D., 589-591), it is said, "it is, however, insisted on behalf of Seeley that Churchill was notified personally by the register, and that such notice is sufficient under the rules. I do not so consider it." See also *Turner v. Bumgardner* (5 L. D., 377).

I am clearly of the opinion that a verbal notice of the rejection of the application is not sufficient. The law calls for a written notice of the rejection, together with the right of the party to appeal. The notice thus being defective, the case of *Massey v. Malachi* (11 L. D., 191) is in point, where it was held that "the right of an applicant for public land should not be prejudiced by mistake of the local office. The failure of an applicant to appeal from the rejection of his application, does not impair his claim, if he is not advised of his right of appeal to the Commissioner." This holding of the Department is again set forth in the late case of *Adamson v. Blackmore* (16 L. D., 111). First Assistant Secretary Chandler there says, "Failure to appeal from the rejection of an application to enter, does not defeat the right of an applicant, where the requisite notice in writing of such adverse action is not given the applicant."

This brings up the question, Did Henry Gauger secure any rights by his second contest of June 23, 1888? This Department has uniformly held that where an entry was canceled under the first contestant's case, that no rights whatever inured to the second contestant.

In the case of *Cleveland v. Banes* (4 L. D., 534) in general terms it was held that "on the cancellation of an entry after contest, the land is open to settlement or entry, subject only to the preference right of the successful contestant," and *ex-parte*, *Armenag Simonian* (13 L. D., 696) it was said: An affidavit of contest filed in the local office, does

not secure any preference right of entry to the contestant, in the event that the entry under attack is canceled on the prior contest of another. Also in *Adamson v. Blackmore* (16 L. D., 111), before cited,

An affidavit of contest filed during the pendency of proceedings by another against the entry in question, confers no right, in the event that the entry is canceled as the result of the prior proceedings, as against the intervening application to enter, filed by a third party after the cancellation of the entry under attack.

My conclusion is that, as the entry of Sheppard had been held for cancellation upon the contest of Bunce, on the 30th of June, 1888, which was not appealed from, the land was subject to entry by the first legal applicant subject to the successful contestant's preference right. That Owens was such applicant, and that his application of July 18, 1888, was improperly rejected. That no legal notice of such rejection was given to him or to his attorney and that in the absence of such notice, he lost no rights by not appealing from the decision of the local officers.

This leads me to hold that the application of Owens to enter the land having been made after it was subject to entry and prior to the application of Gauger, his rights are superior to those of the latter. It follows that your office decision is erroneous and it is accordingly reversed. The entry of Gauger will be canceled and that of Owens reinstated as of the date of his original application, and, upon showing compliance with law, he will be allowed to complete the same.

ABANDONMENT—DESERTED WIFE.

ROCHE v. ROCHE.

A divorced wife who remains on the land covered by the homestead entry of her husband, and shows the fact of his willful desertion and abandonment, is entitled to a judgment of cancellation with a preferred right of entry.

First Assistant Secretary Sims to the Commissioner of the General Land Office, January 10, 1894.

On January 15, 1887, Theodore P. Roche made homestead entry No. 1934 for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ Sec. 18, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 17, T. 4 N., R. 6 E., B. H. M., Deadwood (Rapid City), South Dakota.

On January 19, 1891, he gave notice of his intention to submit final proof, the same to be taken before the register and receiver on March 9, 1891. Notice was accordingly published.

On February 5, 1891, Margaret Roche, then the divorced wife of claimant, filed her affidavit of contest against the entry, alleging that claimant—

Has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law; that this affiant was, at date of

said entry, the wife of said entryman; that she has resided upon said tract of land ever since about the first of March, 1887; that said Theodore P. Roche abandoned her and said claim on or about the 5th day of June, 1889; that on the 19th day of January, 1891, she was decreed a divorce from her said husband.....on the grounds of desertion and abandonment.

Hearing was set for March 9, 1891, before the register and receiver, being the same date fixed by claimant for taking his final proof.

The proof was submitted as advertised, and a hearing followed. The register and receiver recommended that the final proof be accepted and the protest (contest) dismissed. On appeal, your office, by decision dated April 19, 1892, affirmed that judgment, and a further appeal brings the case to this Department.

The decision appealed from is practically based upon the same view of the law and the testimony as that set forth in the decision of the register and receiver, and is to the effect that claimant, by going to the land every two or three weeks after the separation from his wife, and without her knowledge, sleeping in the granary and other unknown places, manifested his good faith, and that his reasons for not continuously living on the land are excusable, owing to a reasonable fear that his wife might kill him or do him great bodily injury.

The specifications of error deny that such conclusions can be reasonably drawn from the testimony in the record.

The facts are substantially as follows:

The land was settled upon by claimant and his wife soon after entry; the improvements are valued at about \$800; Mrs. Roche has continuously lived on the land.

The claimant is by occupation a "gunsmith, machinist and general repairer;" he had a shop in Rapid City, a short distance from the land, and worked there for about two years, but states "every week or so I used to go down there and do all I could on the land." About June 9, 1889, he left the land, after having a difficulty with his wife, and went to a village called Tilford, a few miles distant, where he lived when he submitted final proof. Mrs. Roche testified that he left her and abandoned the place, his excuse being that he did not have anything to eat; that he furnished nothing for two years, and when she failed to collect what was due her and had nothing but potatoes without bread, he left; that she never had an angry word with him. She was a nurse, and thus describes his conduct when he left, and which he does not deny:

I was taking care of Mrs. Childs, and he followed me down there. He says G——d you, go home. If you don't go home, there will be murder. I went. He told me if I didn't turn my children out of doors, he would go where I would never see him. He threw my hat and cloak and bed out in the storm. He then commenced at one side of the room and took the pictures, several of them, and threw them out of the doors, until he broke eight. He took my certificate of marriage and tore it and broke it in pieces, and said: "Now G——l you, prove the marriage." He says, "I will sell the ranch, you go." He then came to my picture, a life-size, and when he went to throw that out, I said: "That is mine." He then caught me by the throat and choked me until my daughter loosed his hand. I never saw him on the ranch after that.

About one year after Roche left the land he brought suit for divorce; the charges in his complaint are not shown. His wife filed her answer, denying the charges and filed her counter-claim, alleging extreme cruelty, wilful neglect, and desertion. A certified copy of a decree of divorce from the circuit court, of the 8th judicial circuit of South Dakota, dated January 19, 1891, has been filed, showing that Roche's allegations are not sustained, and that he had for more than one year "wilfully neglected to provide for the defendant the common necessities of life, he having the ability to do so;" that plaintiff has voluntarily separated from the defendant, with intent to desert her, and that the said wilful neglect and wilful desertion have continued for more than one year prior to the commencement of this action. A decree was accordingly given for divorce on defendant's allegations.

A number of letters were introduced in evidence by Mrs. Roche; these letters, couched in very sentimental and loving terms, were written a few months after he left his wife, and were addressed to a lady, not his wife, who delivered them to Mrs. Roche. One of these letters expressed the fear that the writer would lose his mind, if he were much longer kept away from the lady's company; that she was "the world to him," and that he hoped soon to be released from "my burdens."

Claimant and contestant were married in the year 1882; at that time contestant states that she owned ten lots in Rapid City, a house and lot in Sturgis, a house and three lots in Deadwood, and that the lowest valuation of this property was \$10,000. She states that she was partially blind when she was married, and that she permitted Roche to attend to her business; that when Roche wanted money, she was induced by him to mortgage her property, and he refused to pay either interest or principal, resulting in the loss of all the property. At the date of the hearing, she owned nothing but a cow, which she purchased from means earned as a nurse.

It also appears that the improvements placed on the land were made principally from means furnished by Mrs. Roche; that Mrs. Roche often did a man's work on the place, putting up hay, and working in the field, and that Roche did but little of the work, only leaving his shop occasionally "every week or so to help," as acknowledged by him.

As above shown in the decree, which is fully borne out by the testimony taken at the hearing, Roche abandoned the land in June, 1889, deserted his wife at that time, and refused to supply her with means when amply able to do so. Moreover, his actions and conduct, in other respects, as above set out, were brutal.

It is held, however, that his failure to return to the land is excusable under his claim of duress.

I have carefully examined the testimony on that point, and in my opinion it falls far short of establishing any such claim. It is possible that he thought his own cowardly conduct towards his wife deserved retributive justice from her hands; but the only statement that is shown

to have been made by Mrs. Roche, relating to her injuring him, was one wherein she stated that if he, Roche, should prow! about the premises after night, he might get hurt on the supposition that "it might have been a burglar."

Roche testified that he left his wife because of her bad treatment, her violent temper, and her disposition to quarrel with the neighbors; he states that he had no trouble with neighbors, "I always was everybody's pet, since I came here;" that when he was married he was making from \$83 to \$85 per day, "pretty near every day;" "I did not have time to take the money and I used to tell people to give that to my wife;" that he was then worth between four and five thousand dollars, in tools, goods, and money. . . . In 1879, I made \$1,000 in one day;" that this property he lost in a flood in Rapid City in 1883; that he took none of it to Mrs. Roche; also that prior to his marriage he had been boarding with a woman, who claimed him for a husband. Roche states that after he left his wife, in June, 1889, he used to sleep in the granary occasionally, but was careful not to be seen there; that he did this to maintain his residence, and that he did not return to live with his wife because he was afraid he would be killed.

There is no testimony apart from his own statement which justified such fears. Indeed, he told witness Sarah J. Vanhonten, to whom he wrote the sentimental letters, that he had left the ranch and Mrs. Roche for good; that he intended selling it as soon as he proved up. He further told this witness that he was not afraid of Mrs. Roche; that he never knew her to harm any one. "I just tell I am afraid of her." In his final proof he stated that he and his family had continuously resided on the land; that his family consisted of his "wife;" at that time he had been divorced about two months and had not lived on the land for twenty months.

I do not think that the testimony of Mr. Roche is deserving of much consideration; his statements are extravagant, reckless and unreasonable, and his conduct is execrable and it may be reasonably inferred therefrom that his claim of duress was a pure invention, for the purpose of excusing his admitted abandonment.

Roche abandoned his claim and his wife twenty months before he offered commutation proof. He did this wilfully and the fault was wholly his; he undertook to get a legal separation from his wife on a false allegation; she denied the charges, alleged abandonment and cruelty on his part, and proved it. She remained on the land, continued the improvements and the cultivation, while he purposely and without any valid reason remained away from the land, trying to make an unholy alliance with another woman. When he offered his final proof, it was promptly met by the protest of his former abandoned wife but then a *feme sole*, whose final ruin he would complete, and whom he would eject from the land.

From Roche's own statements, his reasons for abandonment are not

valid ones. The facts which will excuse absence must be such as rendered it compulsory (2 L. D., 152), and it no where appears that he was compelled to leave the premises; on the contrary, the decree of the court sets forth the fact that he wilfully deserted his wife.

The facts in the case of *Gates v. Gates* (7 L. D., 35), cited in support of the ruling of your office and the local office, are very different from those in the case at bar. Gates never abandoned his land or his wife; although he was necessarily absent from the premises for a considerable time, he continued to supply his wife with money during his absence; she remained on the place, and on an ex-parte proceeding, alleging abandonment, obtained a divorce, and then brought a contest, alleging abandonment. The Department found that Gates' absence from the land was not an abandonment, since he always expressed his intention of returning to it, and did so at the earliest opportunity, and when he did return, his entrance to his own house, built by his own means, was forcibly opposed by his former wife. It was held that her action "was unlawful and unauthorized," and she should not be permitted to allege his absence from the tract when she forcibly and unlawfully kept him away.

When a husband is temporarily absent from his claim, having a fixed purpose to return, and his wife during his absence remains on the land, her residence becomes his residence.

Under the operation of the 4th section to the Oregon donation act (9 Stat., 496), the supreme court, in the case of *Vance v. Burbank*, 101 U. S., 514 (cited in the case of *Gates v. Gates*), stated:

The "settler" is made by the statute the actor in securing the grant. He must notify the surveyor-general of his claim. He must occupy and cultivate the land, and otherwise conform to the provisions of the act, and he, or some one for him, must also make the final proof. When this is done, and he becomes entitled to the grant, his wife takes her share in her own right, but up to that time he alone makes the claim. His acts affecting the claim are her acts. His abandonment, her abandonment. His neglect, her neglect. As her heirs must claim through her, whatever would bar her will necessarily bar them. The Land Department, until the final proofs are made, knows only the husband. If contests arise, he is the party to be notified. He represents the claim, and whatever binds him binds all interested through him in the questions to be decided.

The donation act (*supra*) awarded peculiar privileges in giving to both husband and wife generous portions of the public domain, but the grant depended upon acts of settlement, and the husband was required to occupy and cultivate the land, and when the required proof was made, he became entitled to the grant and his wife took her share in her own right. Her right, therefore, was wholly dependent upon his compliance with law.

The homestead law extends no such privileges to the wife, and the decision above quoted, being based upon the generous provisions of the donation act, cannot be tortured into the doctrine that a husband may wilfully desert his land and his wife, obtain a divorce, and after years

have passed obtain patent for the land, on the acts of his abandoned and divorced wife, who has heroically remained on the land, in an earnest effort to comply with the law.

If, therefore, as in the case at bar, the husband, without any valid excuse, deserts his wife and his claim, and his wife remains upon the land, his abandonment is not her abandonment, nor is his neglect, her neglect, nor are his acts affecting the claim her acts, as well say his infamy would be her infamy. Moreover, after she obtained the divorce on the charge of desertion, abandonment and neglect, which the court found from the proofs was fully sustained, and the hearing subsequently had justified that finding, she had a perfect right to interpose those charges against him when he offered to make final proof. Having sustained those charges, and the equities being palpably with her, his entry should be canceled, and she awarded the preference right of entry.

It is so ordered, and the decision appealed from is reversed.

APPLICATION TO ENTER—ORDER OF PROCEDURE.

RICHARD L. BURGESS.

A rule of the local office regulating the presentation of applications, adopted to avoid confusion, is conclusive upon parties taking action thereunder without protest. No rights are acquired under an application to enter that is presented and properly rejected.

First Assistant Secretary Sims to the Commissioner of the General Land Office, January 11, 1894.

The land involved in this appeal is the NW. $\frac{1}{4}$ of sec. 27, T. 12 N., R. 8 W., Oklahoma, Oklahoma Territory, land district.

It appears from the report of the local officers that on April 22, 1892, there being a large number of applicants at the local office to enter the lands, the register and receiver adopted a rule that all should be given consecutive numbers, and as fast as their numbers were called the persons would enter, five at a time. James W. Turner was regularly in the office under the rule, when, by the consent of the others in line, Richard L. Burgess, "who was suffering from some infirmity," was given permission to enter the room and file, first showing his papers to each one, so as to see that there was no conflict, which it seems he did, to all except Turner and the others then in the office. Upon the numbers of his land being called out, Turner said, "that was the tract that he intended entering," and that neither he nor those accompanying him had been consulted regarding Burgess' entrance to the room; whereupon Turner's entry was made, and when Burgess re-presented his application it was rejected. The application of Burgess shows that it had been numbered 3684, and it is claimed his name was entered on

the "Register of Homestead Entries" and then erased and Turner's name written in lieu thereof.

Burgess appealed from said rejection, and your office, by letter of September 30, 1892, affirmed the action of the local officers, whereupon he prosecutes this appeal.

It seems to me that the local officers took the correct procedure in this matter. The only thing they could do was to reject Burgess' application when it was ascertained that Turner was there regularly before him seeking the same land. In the case of Reuben G. Eppler (14 L. D. 370), it was decided (syllabus)—

An order of procedure, adopted by the local office regulating the presentation of applications on the opening of public lands to entry, is conclusive upon parties taking action thereunder without protest.

Burgess made no objection to the order of procedure. By the courtesy of those in line by reason of his affliction, he was permitted to go in ahead of his time. When the land he was seeking was called out, Turner, who had not been consulted about Burgess' advancement, announced that he was after that particular tract of land. The local officers then accepted Turner's, and properly rejected that of Burgess. There was no error in this proceeding.

Counsel for Burgess now say that Turner has relinquished his said entry, and ask that Burgess' application be now allowed. I do not think this can be done. His application was properly rejected, and where this is the fact he acquires no right by reason of the presentation of his application. In the case of Goodale v. Olney (13 L. D., 498), it is decided that—

At the date of Olney's application to enter, the land was not subject to entry and he could have acquired no right by virtue of his application to enter that could have reserved the land from other disposition when it became subject to entry, unless he was then a settler on the land, having priority over all others. His right would rest, however, upon the settlement and not upon his application.

This statement of counsel is uncorroborated, and therefore is insufficient to warrant me in ordering a hearing, as requested. But if the statement made by counsel that Turner's entry had been canceled by voluntary relinquishment, and the land is now vacant; that Burgess has been since April 19, 1892, and now is in possession, living upon and improving said land, are true, I see no reason why an application presented at the local office may not be received. This is a matter, however, that the local officers must first pass upon.

Your said office decision is affirmed.

DESERT LAND CONTEST—RECLAMATION.

DICKINSON v. AUERBACH.

Reclamation is an accomplished fact where the water in sufficient volume has been brought on the land, and so disposed as to render it available for distribution when needed.

First Assistant Secretary Sims to the Commissioner of the General Land Office, January 15, 1894.

On February 11, 1887, Frederick H. Auerbach made desert land entry, No. 2052, of the NW. $\frac{1}{4}$ of section 23, the NE. $\frac{1}{4}$ of section 22, the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 15, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 14, all in township 1 N., range 2 W., situated within the Salt Lake land district, of Utah.

Final proof was made and filed on December 12, 1889, and on the same day final certificate was issued.

On March 8, 1890, Lewis S. Dickinson filed an affidavit of contest, alleging his familiarity with the land embraced in Auerbach's entry, and that

on March 4, and 6, 1890, he was upon and over same and every legal subdivision thereof with a view of learning if said Auerbach had complied with the law; that no part of said land is irrigated, or reclaimed, or improved; that there is no spring, well, water, or ditch upon said land, save and except an incomplected dry ditch which runs diagonally across the northeast corner thereof; that said ditch has never contained water, and there has been no water conveyed upon said land; that in the opinion of affiant said entryman has totally failed and neglected to comply with the law in regard to said claim.

On the issues thus raised hearing was ordered and held in the local office, beginning August 8, 1890, and continuing for thirty days. The register and receiver recommended the dismissal of the contest, and appeal is now prosecuted to this Department from your office decision reversing that recommendation and holding Auerbach's entry for cancellation.

For the purposes of discussion, that which is pertinent of the huge mass of evidence may be conveniently divided into expert and non-expert, and proceeding, first, to consider the testimony that lies within the domain of fact, rather than of theory, it may be stated, generally, that the witnesses, several in number, introduced in behalf of the contestant, testify to the insufficiency of the system of canals and ditches for the irrigation of the six hundred and forty acres embraced in the claim. One of these in particular says he was on and over the land several times during the months of September, October, November and December, 1889, and up to the latter month none of the land had been irrigated from the ditches and canals. No one was at work, he says, at any time in October, and water was not during that month distributed over the land. His testimony goes squarely to the point of fact in dis-

pute, and seems to me to be sufficient to place the claimant upon his defense, since it was in October that the latter conducted water on the claim with the special view of supplying the testimony required for final proof. Contestant's other witnesses were sworn, not for the purpose of showing that irrigation had not been accomplished, but that irrigation was impossible under the conditions that prevailed with respect to water ways and ditches. That is to say, one of the witnesses was able to say unqualifiedly, and with emphasis, that water had not, as a matter of fact, been carried on to the land at the time contended for by the contestee, while the other lay witnesses gave it as their opinion that water could not have been so conducted. In the first instance, the witness is presumed to have been present, and was therefore in a position to speak from actual knowledge, while as to the others, the testimony was given from observations made, for the most part, many months after the irrigation season was over. The tendency of this evidence is to show that the ditches were insufficient in number and capacity, and inadequate, on account of location, for the irrigation of a substantial section of the claim lying to the south and southwest.

In rebuttal of this, the contestee introduced quite a number of witnesses, including himself, his partner in business, the man who constructed the ditches and had charge of the irrigation, and his assistants, who swore that water was actually conducted to and upon every subdivision of forty acres, and that the supply was ample. It is to be observed that these persons were present on one or more of the several days in October, 1889, when the test is alleged to have been made. Assuming to testify to facts actually within their knowledge, their evidence is thus stripped of all speculation and theory. If they have sworn truly, the contest must be dismissed; and if falsely, the contestee has failed in his defense. It will be of advantage, at this point, to consider the expert testimony.

It appears that the water supply is obtained from the river Jordan which flows within six or seven miles of the claim. The waters of the river were diverted some years ago, through the joint efforts of the city of Salt Lake and of the farmers and ranchmen living along the banks of the river, for the purpose of affording protection in seasons of excessive high water from the inundation to which the adjacent low lands are subject. The vent, or way, constructed in order to effect this object, is known as the Surplus canal. This is tapped by the North Point canal, and the latter by the West Point canal, which is the principal source of supply for the ditches of the Auerbach tract.

In rebuttal of the evidence submitted by the contestee in support of the fact of actual irrigation, the contestant employed several civil engineers and sent them on the land to take measurements. These operations appear to have been conducted on a rather elaborate scale, as shown by the numerous artistically executed maps and diagrams introduced in evidence and filed as exhibits. The material part of these

relates to the carrying capacity of the West Point canal, touching the points of volume of water and its velocity. These two facts being given, the irrigating capacity of any conduit is easily ascertainable. It will subserve no useful purpose to transcribe here the figures indicating the technical results of this professional work. To the lay mind they would convey no information. It seems sufficient to state that the engineers found the main ditch, known as the West Point canal, to be efficient for the irrigation of scarcely one-third of the Auerbach entry. They also found that the differences of level were such as to render a large part of the land non-irrigable from the main ditch. These conclusions are in line with the contestant's non-expert testimony based on simple observation without the use of instruments.

On the other hand, the contestee supplements the showing on final proof, and the evidence of persons who were present in October, 1889, during the progress of the customary test, with the testimony of four experts, two of whom are hydraulic engineers of wide experience in the practice of their profession both in this and other countries. These witnesses base their evidence on measurement, and experimentation, and inasmuch as their methods have been made the subject of criticism by the plaintiff's counsel, it appears desirable to briefly indicate them here, in so far as they were practical, rather than scientific or technical, in their nature. It is to be borne in mind that the opposing engineers had obtained results, through purely scientific methods, without the employment of practical aids, which were thought by the attorney for the defendant to be inaccurate and unreliable. Either the positive and direct testimony of the defendant's witnesses was false, or else the data of the measurements of the plaintiff's engineers were erroneously taken. The two could not stand together.

The two hydraulic engineers, Stevenson and Scougall, after making measurements to ascertain the capacity of the North Point canal, proceeded to the main Auerbach ditch, and caused a dam to be built about a half mile distant from the point of their operations. It was desirable to ascertain the actual capacity of the ditch, not during any given period of time, but at any moment of time. In other words, it was thought important to show how much "dead" water the canal would hold, and to that end the damming process was resorted to, in order to back the water along its entire length. Considering its purpose, I see nothing to find fault with in this *modus operandi*. The plaintiff had caused a line of levels to be established along the ditch, and these, having been duly diagrammed and put in evidence, might well be expected to create doubt as to its capacity to conduct the volume of water required for the irrigation of so large a body of land. The defendant desired to oppose fact to theory, and therefore his engineers measured actual water, while those of the plaintiff measured space. The specious suggestion is made by the contestant's counsel that the dam was built for the purpose of accelerating the flow when removed

so as to effect a gain in velocity. It is true that the question of velocity plays an important part in all schemes of irrigation, but it is shown with the utmost conclusiveness, to my mind, that the engineers in charge waited for the resumption of the normal flow in the canal, after the removal of the dam, before proceeding with their experiments. The velocity found by them can not, therefore, be attacked on that ground.

Pursuing such methods, these experts found that the West Point canal was ample in capacity for the successful irrigation of the entire tract, and their testimony, so far as it goes, fully supports that of the non-expert witnesses.

I have here given, according to my best judgment, after carefully reading, and in some parts re-reading it, a fair resume of the evidence bearing more particularly upon the question as to whether or not the claimant has provided for the conduct of a sufficient supply of water on to the land. In my opinion, the preponderance of the evidence is clearly in favor of the affirmative of this proposition.

With respect to the distribution of the water over the smallest legal subdivisions, as the law contemplates shall be done, I find greater difficulty in reaching a conclusion. The correct and equitable view of this question requires, not so much the actual presence of water on each forty, as the power to conduct it there when required. Supply *in posse*, rather than *in essee*, meets the requirements of the law, and satisfies the demands of equity. The main ditch having been shown, in this case to afford an ample flow of water for the irrigation of the claim in its entirety, and its actual flooding having been proved, the obliteration of the small ditches and water furrows months after the test, was a thing to have been expected. These are merely temporary, and are changed annually, or oftener, according to the exigencies of farming operations. Potential irrigation is accomplished when the water, in sufficient volume, has been brought on the land, and so disposed as to render it available for distribution when needed. It is seldom that a farmer plants to crop, or otherwise cultivates, the whole body of his farm, and frugality and prudence demands the irrigation of that part only from which a harvest is expected. Good husbandry, however, as well as the law in the case of the desert land entryman, exact this potential irrigation.

The evidence discloses that, of the six hundred and forty acres comprising the entry, there are about one hundred and twenty acres of very low land, and this is designated on the maps, or diagrams, as sloughs. For the better part of the year these low places contain water, but when this is taken up by evaporation during the dry season, there are left alkaline and saline deposits. There is evidence to the effect that by continuous and persistent flooding with fresh water these sloughs may be rendered useful for the production of grasses. It is not made clear how long the process must be continued in order to secure

results, but time is shown to be an important and necessary element of success, dependent in a great degree upon the quantity and extent of the deposits to be neutralized.

The fact of prior appropriation is not clearly shown by the contestee, but under the issues raised by the contestant, it does not seem to me that he was bound to do so. It is in evidence, and I think proven, that he had actual control of a sufficient water supply, without serious protest from any source, and since the question of title is not presented as an issue, I shall not pass upon it.

I find, respecting all the matters in issue, that the preponderance of the testimony is in favor of the contestee, and your office decision is therefore reversed, and the contest dismissed.

CONTEST—PRE-EMPTION ENTRY—HEARING.

MORIN v. GENSMAN.

A pre-emptor is under no obligation to remain on his land and cultivate the same after the submission of final proof and the issuance of final certificate thereon, and a charge of abandonment after final proof and payment does not afford any ground for a hearing.

An indefinite and general charge that an entry is made for speculative purposes does not warrant an order for a hearing.

First Assistant Secretary Sims to the Commissioner of the General Land Office, January 18, 1894.

The land involved in this motion is the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 35, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Section 34, T. 27 N., R. 8 W., Helena land district, Montana.

On February 29, 1892, John P. Gensman's final proof on his pre-emption entry was accepted by the local office, and final certificate was accordingly issued.

An affidavit of contest was executed April 27, 1892, by Morin, which, on April 30, the register and receiver forwarded to your office, and July 13, 1892, a decision was rendered and hearing refused, and on September 10, 1892, Morin appealed to the Department, alleging the following errors:

1. In holding that the allegations in the said affidavit of A. H. Morin for contest are insufficient to warrant the office in ordering a hearing.
2. In denying a hearing upon said affidavit for contest.
3. In holding that the said entry appears upon the face to be valid.

The affidavit is as follows:

STATE OF MONTANA,

County of ———, ss.

Personally appeared before me A. H. Morin, of Deer Lodge county, State of Montana, who upon his oath says that he is well acquainted with the tract of land embraced in the pre-emption entry of John P. Gansman, for the west half of south-

west quarter of section 35, and north-east quarter of the south-east quarter and south-east quarter of north-east quarter, of section 34, township 27, N., R. 8 west, and knows the present condition of the same; also that the said John P. Gansman has wholly abandoned said tract; that he has changed his residence therefrom for more than six months after making said entry; that said tract is not settled upon and cultivated by said party as required by law, that he abandoned said land and removed to other land situated on the Marias, Choteau county, Mont.; that after he had abandoned said claim, and affiant settled upon the same for the purpose of securing a home, he drove or caused to be driven the affiant from said claim by force of men in the employment of Clark Bros., in whose interest he the said claimant settled on said claim and completed title in their interest; that the said John P. Gansman took said land for speculative purposes, and not for securing a bona fide home for himself. That he made a contract or agreement with Clark Bros. by which the title he might and did acquire from the United States, would inure to the benefit of said Clark Bros. directly or indirectly. That the said John P. Gansman is not now living on said land, but is presumed to be at Demarsville, Missoula county, Montana, having abandoned said land in accordance with his agreement. And this the said contestant is ready to prove at such time as may be named by the register and receiver for a hearing in said case; and he therefore asks to be allowed to prove said, allegations, and that said pre-emption entry, may be declared canceled and forfeited to the United States; he the said contestant, paying the expenses of such hearing. Affiant has made personal inquiry and caused inquiry to be made at Choteau, Montana, entryman's last known place of residence in this State, and after due diligence personal service can [not] be had on the said entryman within the State.

A. H. MORIN.

It will be seen that the affidavit contains three charges: First, that Gensman abandoned the land for a period of six months, subsequent to making entry and failed to cultivate the same in accordance with the law. As the entry was made in February and the contest affidavit in April, the charge of abandonment for six months after entry, is necessarily erroneous. As a matter of law the entryman's case rested with his final proof, and no subsequent acts of his could, in any way, alter the showing then made. He had a right to lease the land, and the supreme court has said, in the case of *Myers v. Croft* (13 Wall., 291,) that—

the object of Congress was attained when the pre-emptor went with clean hands to the land office and proved up his right and paid the government for the lands. Restriction upon the power of alienation after this would injure the pre-emptor and could serve no important purpose of public policy.

And this Department in the case of *Morfev v. Barrows* (4 L. D., 135), has said that "the sale of the land shortly after making proof and payment does not warrant a presumption against the good faith of the entryman." It would thus follow that his leaving the land after final proof would be no just or adequate ground for cancelling the entry, or refusing to issue patent. Nor would his failure to cultivate the land give the contestant any rights. *Coffey v. Tracey et al.* (12 L. D., 492).

Second, that after the entryman abandoned the land, he, the affiant, moved upon it for the purpose of securing a home and that the said Gensman drove, or caused to be driven, the affiant away from the land. As the final proof of the entryman had been accepted Morin was noth-

ing more than a trespasser, and as such, Gensman had a right to dispossess him.

Third, that Gensman took the land "for speculative purposes and not for securing a *bona fide* home for himself; that he made a contract or agreement with Clark Bros. by which the title he might and did acquire from the United States would inure to the benefit of said Clark Bros. directly or indirectly." This allegation is too uncertain and indefinite to grant a hearing on. It does not allege whether said contract was made prior or subsequent to the entry.

Upon the whole the affidavit lacks precision, and this Department will not exercise its ingenuity to discover its meaning. The affidavit should speak for itself without necessitating a labored construction of general and vague charges.

Your office opinion is therefore affirmed.

RAILROAD GRANT—TERMINAL LIMIT.

CALIFORNIA AND OREGON R. R. CO.

An incorrect terminal limit can not be recognized on the ground that the company has adopted the same in specifying losses under its indemnity selections, where it appears that such limit has never received the sanction of the General Land Office or the Department.

Secretary Smith to the Commissioner of the General Land Office, January 20, 1894.

In your letter of November 10, 1893, are set forth the facts relative to the location of the California and Oregon Railroad between Roseville and Chico, and of the withdrawals ordered thereon.

By the act of July 25, 1866 (14 Stat., 239), a grant was made to aid in the construction of a railroad from a connection with the Central Pacific Railroad in California to Portland, Oregon.

The point of connection was made at Roseville, California.

From your letter it would appear that no terminal has ever been formally established to the grant at Roseville, but the diagram on file and in use in your office showing the limits of the grant, has a terminal drawn in pencil, which, you state, has been accepted by the company and acted upon in designating lost lands in support of indemnity selections, and while not strictly correct, yet, under the circumstances, you recommend its adoption and request authority to make it permanent.

Your letter further states that this terminal "can not affect the status of any land in its vicinity, the same having been disposed of." It is also presumed that the approval of this terminal will not affect any previous disposition.

This grant overlaps at this point the prior grant for the Central Pacific Railroad.

Should there be any tracts excepted from the prior grant and free from claim at the dates of the passage of the act making the grant for the Oregon and California Railroad, and the date of the filing of its map of definite location opposite the same, such lands would be affected by the latter grant, if within its limits, and the location of the terminal might affect this question.

It is admitted that the terminal, as shown by the pencil line, is incorrect, and the only reason given for recognizing the same is that the company has acted thereon in specifying a basis for certain of its indemnity selections heretofore made and patented.

In other words, the company without awaiting, or securing the establishment of a terminal to its grant at Roseville, has gone ahead and, in recognizing an arbitrary line which never has directly received the sanction of your office or this Department, specified as a basis for certain of its indemnity selections, lands without its grant, and now asks that this Department give recognition to an incorrect terminal so that these lands may be brought within the grant.

This case differs materially from the cases cited by you, viz., C. W. Aldrich (13 L. D., 572) and Southern Pacific R. R. Co. (14 L. D., 264).

In both of said cases the limits had been regularly established and recognized for years, both by your office and the local office.

I can not see upon what grounds I would be authorized in establishing an incorrect terminal.

If the company has given a basis which in law does not support the selections, and this office has erroneously recognized the same, the proper step, under the circumstances, would be to call its attention to the error and require that it specify a good basis for such of the selections as have been approved, before further approvals will be recommended.

This would seem to be the spirit of the circular of August 4, 1885 (4 L. D., 90), but the terminal when established should be drawn in the proper manner.

HOMESTEAD ENTRY—CONFLICTING SETTLEMENT RIGHTS.

JOHN W. AUSTIAN.

When a homestead applicant alleges a prior settlement right as against an entry of record, a hearing should be ordered to determine the rights of the parties.

First Assistant Secretary Sims to the Commissioner of the General Land Office, January 23, 1894.

John W. Austian has appealed from your decision of July 23, 1892, sustaining the action of the local officers in rejecting his application to make homestead entry of the NW. $\frac{1}{4}$ of Sec. 34, T. 13 N., R. 4 E., Oklahoma land district, Oklahoma Territory.

The ground of the rejection was that it conflicted with the prior homestead entry of one John Brown, and "for the further reason that the applicant had exhausted his homestead right."

The appeal is taken on the grounds, substantially, that you "erred in not ordering a hearing to determine the respective rights of applicant and entryman, instead of rejecting his papers and tender of fees and commissions;" and "in holding that the applicant should have prosecuted his claim to the land as a prior settler, by contest and not by application to enter the same."

Your decision is correct in so far as it holds that the applicant is "not entitled to enter the tract applied for so long as Brown's entry remains uncanceled." "A homestead entry is a segregation and an appropriation of the land covered by it, and while it remains uncanceled the land is not subject to further entry." (*Whitney v. Maxwell*, 2 L. D., 98). "Two entries for the same land can not be allowed of record at the same time" (*Russell v. Gerold*, 10 L. D., 18; *Swims v. Ward*, 13 L. D., 686; *Edwards v. Kemp*, 15 L. D., 405).

While this is true, it is also true that the local officers did not perform their whole duty when they formally rejected the application to enter without further action.

It has been uniformly held by the Department that—

when a pre-emptor applies to file a declaratory statement for land embraced in an entry of record, alleging settlement prior to the date of such entry, the proper practice is to order a hearing to determine the respective rights of the parties.

(*James et al. v. Nolan*, 5 L. D., 526. See also *Bishop v. Porter*, 2 L. D., 119; *Austin v. Thomas*, 6 L. D., 330; *James A. Forward*, 8 L. D., 528; *Willis v. Parker*, *ib.*, 623; *Baxter v. Crilly*, 12 L. D., 684). And in the case of *Todd v. Tait* (15 L. D., 379) the Department held (see syllabus):

When a homestead applicant alleges a prior settlement as against an entry of record, a hearing should be ordered to determine the rights of the parties.

You do not pass upon the question as to whether Austian had exhausted his homestead right prior to his application to make entry of the tract here in controversy, nor do you furnish the facts relative to the matter that will enable me to do so. This question should be investigated at the same hearing had to determine the truth of his allegation of prior settlement, as in the case of *Todd v. Tait* (*supra*), in which the Department directed "a hearing to determine the rights of the parties, and the qualifications of the applicants."

Your decision is modified as herein indicated; and you will direct that a hearing be had to determine the rights of the parties, and their qualifications to make homestead entry.

WAGON ROAD GRANT—WITHDRAWAL—SELECTION.

WILLAMETTE VALLEY AND CASCADE MOUNTAIN WAGON ROAD CO.

Directions given that due notice be served upon the company that it will be allowed ninety days from date of service of such notice within which to complete its selections, and that, at the expiration of such time, the order of withdrawal, heretofore made for the benefit of the company's grant, will stand revoked, and the lands unselected will be disposed of as other public lands.

Secretary Smith to the Commissioner of the General Land Office, January 27, 1894.

With your letter of the 2d inst., was transmitted, with the recommendation that the same be approved, five lists of lands, numbered 4, 5, 6, 7 and 8, aggregating 161,274.42 acres, selected on account of the grant made by the act of Congress approved July 5, 1866 (14 Stat., 89), to aid in the construction of a military wagon road from Albany, Oregon, to the eastern boundary of said State, which grant was, by the State, conferred upon the Willamette Valley and Cascade Mountain Wagon Road Company.

In said letter are set forth the facts relative to this grant as disclosed by a preliminary adjustment.

From your letter the following appears:

The company's line of constructed road is 448.7 miles long, and at three sections per mile the grant aggregates 861,504 acres.

There has already been patented on account of this grant 549,809.29 acres, leaving 311,694.71 acres necessary to satisfy the grant.

The list submitted for approval aggregate 161,274.42 acres, and you report that there are yet pending 17,824.18 acres in conflict with claims asserted under the general land laws.

To satisfy the grant it is but necessary to select 132,596.11 acres, unless the selections so far as in conflict with adverse claims be abandoned. Including this amount it would be necessary to select about 150,000 acres.

This grant is one of quantity, viz., three alternate sections per mile to be selected within six miles of the road.

The lands were early withdrawn to the full extent of six miles on each side of the road, hence, the withdrawal was nearly twice the amount of the grant.

Your letter reports that there yet remains in the limits of the withdrawal, vacant lands amounting to 752,811.74 acres, of which 462,621.74 are surveyed.

It will thus be seen that more than 750,000 acres are retained in a state of reservation to await the company's selection of less than 133,000 acres.

I have therefore approved the lists submitted, which are herewith returned as the basis of patents to be issued to the company, but direct

that due notice be served upon the grant claimant; that it will be allowed ninety days, from date of service of notice, within which to complete its selections, and that at the expiration of such time the order of withdrawal will stand revoked and the lands unselected, will be disposed of as other public lands.

This will not prevent the company's selection after that date, but it will then be a matter of diligence between the company and claimants under the general land laws.

As to the lands covered by pending selections which are in conflict with adverse claims, I reserve decision, leaving the matter to be determined according to the facts in each individual case.

FLORIDA SWAMP LANDS—THE EVERGLADES.

THE STATE OF FLORIDA.

Patent under the grant of swamp lands may issue to the State of Florida covering "the Everglades" upon an estimated area, and designated by metes and bounds, excepting therefrom all islands and bodies of water not subject to the terms of the grant.

In order to make such exception operative it will be necessary to have each of said islands and bodies of water, so excepted, segregated by survey, so that they may be specifically identified by appropriate descriptions in the patent.

Secretary Smith to the Commissioner of the General Land Office, January 30, 1894.

Under date of June 24, 1893, S. I. Wailes, agent and attorney for the State of Florida, addressed a letter to the Department, as follows:

As agent and attorney for the State of Florida I desire to call your attention to the claim of that State, under the swamp-land act of September 28, 1850, to the lands in what is termed "The Everglades," situated in the southern portion of the State.

The lands, though unsurveyed, have been selected as inuring to the State under the swamp-land grant, the areas being estimated. The system of public land surveys has never been extended over "The Everglades," for the reason that in all cases of the survey of contiguous lands the surveyors report "impracticable to survey," "impenetrable marsh, etc." It is a historical fact that it is utterly impracticable, if not impossible, to penetrate such lands sufficiently to extend the system of surveys over the same. There is no question but that the lands lie in that portion of Florida and marked on the maps as "Everglades" are now and always have been swamps and overflowed within the meaning of the swamp-land act of September 28, 1850.

The history of Florida, the records of the General Land Office, and all obtainable evidence clearly establishes the character of these lands, and under the present laws and regulations only agricultural lands can be surveyed, I most earnestly pray that the lands in question may be certified and patented to the State. Should the evidence on file in the General Land Office, in connection with other general and notorious facts, be deemed insufficient, I most respectfully ask that you direct that a trustworthy agent of the government be sent to Florida for the purpose of ascertaining the true facts in the case and to protect the interests of the government.

Should Florida be compelled to wait until the public land surveys shall have been extended over the "Everglades," she will be defeated of her rights in the premises, for such surveys under existing laws and regulations can never be made.

Could the matter be determined and the title to these lands passed to the State, steps would be taken looking to their ultimate reclamation by the building of extensive and costly canals. Parties are ready to undertake such a system of reclamation, but will not commence operations until title thereto shall have passed to the State.

In conclusion, I most earnestly desire that you give this matter your personal attention, to the end that the rights of the State may be determined and her claims under the law finally adjudicated.

On October 5, 1893, the said letter was referred to your office for report, in duplicate, and return of papers.

In compliance with the above request, your office letter of October 17, 1893, submits the following statements:

The lands referred to are, in great part at least, pre-eminently such lands as were granted by the swamp land act of September 28, 1850, namely, swamp and overflowed lands. The only difficulty in the way of complying with the request of Mr. Wailes is in determining, from the great expanse of country claimed, what are swamp and overflowed lands from lands that are not of that character.

The law makes the quarter-quarter section, or forty-acre tract, the unit on which to act in determining the character of the land: if the greater part of the unit is in fact swamp land, the whole is of that character in law; but if the greater part of the unit, or forty-acre tract, is dry land, the whole is dry land in law, and, therefore, land not granted by the swamp land grant. It is known that there are a number of islands in the Everglades, some of them of considerable extent, and it follows that the lands forming such islands were not granted to the State if they were dry land at the date of the grant.

The Encyclopædia Britannica, article FLORIDA, contains the following general information on the character of the lands in question:

"The most remarkable feature is the immense tract of marsh filled with islands in the southern part of the state, called the Everglades; and by the Indians 'grass-water' The district comprised in the Everglades is impassable during the rainy season, from July to October. It is about 60 miles long by 60 broad, covering most of the territory south of Lake Okeechobee, or Big-water. The islands with which this vast swamp or lake is studded vary from one-fourth of an acre to hundreds of acres in extent. They are generally covered with dense thickets of shrubbery or vines, occasionally with lofty pines and palmettos. The water is from one to six feet deep, the bottom being covered with a growth of rank grass. The vegetable deposit of the Everglades is considered well adapted to the cultivation of the banana and plantain."

It is estimated that the claim of the State of Florida to swamp lands in the Everglades amounts to about three million acres. The selection lists, which are the basis of the claim, were filed principally in 1886 and 1888. As the lands are not surveyed, the descriptions in the lists are general, such as "all of section;" or "all of township," referring to a section or township not recognized on the maps.

The inclosed map of Florida, marked "Exhibit A," shows the location of the lands claimed.

Protests and objections have been received in this office against approving to the State some of the lands claimed in, or on the borders of, the Everglades. See copy of letter of Mr. J. A. McCrory and copy of report of Mr. J. R. Hampton, herewith, marked "Exhibits B and C," respectively.

The Department has made a number of decisions relative to Florida swamp lands. The decisions of January 12, 1889 (8 L. D., 65), is not directly applicable to the case

under consideration, for the reason that, in the case decided, the claim to the lands had been confirmed to the State by act of Congress; whilst in the case of the lands under consideration the claim is subject to adjudication on its merits by the Department. The decision of March 25, 1889 (*ibid.*, 369), is more directly applicable to the case under consideration, and it will be observed it somewhat modifies the general principles laid down in the first-named decision relative to the action to be taken on unsurveyed lands.

This office has not sent a special agent to attempt to examine the land in the field, for the reason that, being unsurveyed, any portion that might be found to be dry land, and therefore not granted, could not be identified or described by section, township, and range, so as to distinguish it from the great mass of other lands, swamp or otherwise, surrounding it.

The swamp land grant makes it the duty of the Secretary of the Interior to cause the lands granted to be identified and to be listed. The Commissioner of the General Land Office identifies the lands granted and prepares the lists for the Secretary's action, under the law and the regulations prescribed by the Secretary thereunder. The reason why the lands in question have not been identified and lists of them submitted to the Secretary for approval is, as indicated above, that as the law makes the forty-acre tract the swamp land standard, it is impossible to determine whether or not all lands claimed are swamp lands, since there is no basis for action on account of there being no forty-acre tracts designated by survey. The regulations and decisions of the Department appear not to prevent any authoritative method of overcoming the difficulty.

It appears that "The Everglades" is a large body of land the most of which is swamp lands within the meaning of the act of 1850, and is incapable of being surveyed, and having been rendered so by the very agencies that induced the passage of the act itself.

The question, therefore, presented by the report in your office letter above may be stated, substantially, in these words: Can your office issue patent covering these lands to the State of Florida, they being unsurveyed and dotted with islands of such character as to exclude the land composing them from the operation of the statute, under which the State of Florida claims title?

As to that portion of "The Everglades," which was incapable of survey in 1850, and has so remained until the present time, I have no doubt touching the right and duty of your office to issue the patent sought.

The object of the statute of 1850 (9 Stat., 519) was to enable the various States to reclaim the swamp lands within their midst that were unfit for cultivation. The provisions of said act are as follows:

That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

Sec. 2. And be it further enacted, that it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however,* That the proceeds of said lands, whether from sale

or by direct appropriation in kind, shall be applied, exclusively, so far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

Sec. 3. *And be it further enacted*, That in making out a list and plats of the land aforesaid, all legal subdivisions the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

Sec. 4. *And be it further enacted*, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated.

The fact that the lands in question have not been surveyed, and more especially since they have been determined to be practically incapable of survey, can not affect the rights of any State under the provisions of the above recited act. This question has been settled by the Department in the case reported in 8 L. D., 65, and re-affirmed in the case reported in the same volume, page 369, in the following language:

The failure to make a subdivisional survey of the township, can in no wise affect the right of the State under the grant to all of the swamp and overflowed lands, as contemplated by the grant, and the only purpose to be subserved by a subdivision of the township is to enable the Secretary to determine whether by such subdivisional survey there might be one or more legal subdivisions, the greater part of which is dry and fit for cultivation. If, however, "the whole of a township, or any particular or specified part of a township, or the whole of a tract of country bounded by specified surveyed or natural boundaries, is of the character embraced by the grant," a subdivisional survey of the township would not be necessary to enable the Secretary to make out a list and plat of the swamp and overflowed lands in accordance with the provisions of the act, because if "the whole of the township" or the whole of a tract of country bounded by specified surveyed or natural boundaries, is swamp and overflowed, it necessarily follows that a subdivision of the land would show that the greater part of each smallest legal subdivision is swamp and overflowed, and therefore of the character of lands described in the grant.

The soundness of the opinion of the Department as above quoted is sustained by the application of the ordinary rules of construction to the act of 1850. Keeping in mind that the leading object and intention of the act was to convey such lands as are unfit for cultivation, it should receive that construction which will promote the execution of that object. To limit the application of the statute to lands which have been or can be surveyed would be to defeat the very purpose of its enactment.

In 1st Kent's Com., page 461, appears the following lucid statement of the rule of construction applicable to the statute under consideration:

In the exposition of a statute the intention of the law-maker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt, and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion.

It is already settled by the Department that where swamp lands "can be designated in the patent by metes and bounds, or by any other accurate description which clearly indicates and describes the particu-

lar land selected, the want of a survey will be no objection to the issuance of patent."

In this case, I see no reason why patent may not issue covering "The Everglades" upon an estimated area, and designated by metes and bounds, excepting therefrom all such islands as were at the time of the passage of the act of 1850 not included in the terms thereof.

In order, however, to make such an exception operative, it will be necessary, in my opinion, to have each of the islands, so excepted, segregated by survey, so that they may be specifically identified by appropriate descriptions in the patent. It is necessary to segregate such islands only as were fit for cultivation at the date of the passage of the act.

While patent may issue to the State of Florida conveying an unsurveyed tract of swamp land, if sufficiently described by metes and bounds, or otherwise, still any exception from such patent of portions of land within the boundary limits of said tracts would be inoperative, unless such portions were designated and specifically described in the exception.

In the case of *Davis's Administrator v. Wiebbold*, 139th U. S. Reports, 507, it was held, substantially, that where patent issues under the townsite laws, although containing an exception of all mineral lands embodied in the premises, carries with it the title to the whole tract, unless some portion of it was known to be mineral at the date of such patent. Applying the principle therein enunciated to the matter under consideration, a patent to lands, issued in conformity with the provisions of the swamp land act above referred to, notwithstanding an exception therein of lands fit for cultivation, would pass title to the whole tract, unless the excepted portions were specifically designated as being excluded from the operation of the statute at the date of its enactment.

The practical difficulty in the way can be obviated only by the segregation of such islands and bodies of water as would not pass to the State, in accordance with the provisions of the act under consideration.

The title to that portion of The Everglades, which was swamp lands in 1850, has been in the State of Florida ever since the date of the swamp land act, and a proper segregation of such lands therein as are not swamp land within the meaning of that act will render such title perfect, whether patent issues or not.

The segregation might be accomplished, either by the State in the manner just mentioned, or by the government, or by both jointly, if a survey is practicable, if not, then the intervention of Congress must be sought in order to adjust the claims of said State.

DESERT LAND ENTRY—ASSIGNMENT.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 26, 1894.

*Registers and Receivers,
U. S. Land Offices.*

SIRS:

In the matter of the assignment of desert-land claims, as recognized by the act of March 3, 1891 (26 Stat., 1095), I have to advise you that this Department, in the construction of said act, holds that the assignee must possess the qualifications required of the original applicant in the matter of citizenship and residence in the State or Territory in which the land claimed is situated. See 14 L. D., 565.

You will, therefore, require the assignee, whenever the assignment of a desert claim is filed in your office, to show the qualifications exacted of an original applicant under the desert-land law, in these particulars, and advise him that if he fails, within thirty days from notice, to make the showing required, that his assignment will not be recognized. All assignments filed, however, should be forwarded to this office with due report of action taken thereon.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

HOKE SMITH,
Secretary.

MOTION FOR REHEARING—EVIDENCE—OKLAHOMA LANDS.

ROBB ET AL *v.* HOWE.

A motion for rehearing on the ground of newly discovered evidence should set forth statements of fact showing in what manner such evidence was obtained, and from which it may be determined whether the applicant has used due diligence. The register and receiver have no authority to exclude testimony offered at a hearing, but may summarily put a stop to obviously irrelevant questioning. Confidential communications of the client to his attorney are not competent evidence in support of a charge subsequently made by the attorney against the entry of his former client.

Information of a general character as to desirable lands in Oklahoma, communicated by another prior to the opening of said Territory, does not disqualify the entryman under the statute opening said lands to entry.

Secretary Smith to the Commissioner of the General Land Office, February 3, 1894.

(E. M. R.)

This case involves the SE. $\frac{1}{4}$, Sec. 27, T. 12 N., R. 3 W., Oklahoma City land district, Oklahoma Territory.

The record shows that Henry Howe made homestead entry (Guthrie-

series) for the above described tract on April 25, 1889. On May 9, 1889, Almira C. Robb filed an affidavit of contest against said entry alleging that said tract was not settled upon or cultivated as required by law, and that there were no improvements upon the land; and further, that Henry Howe entered and occupied the lands described before noon of April 22, in violation of the act of Congress and the President's proclamation opening the Oklahoma Territory to settlement, and that she (the contestant) was the first to enter and settle upon the land.

On May 22, 1889, Frank H. Woodruff filed an affidavit of contest against the entry of Howe in which he alleged prior settlement and the disqualification of Howe, by reason of violation of the law opening the Oklahoma Territory, he having entered the Territory prior to noon on April 22, 1889.

September 16, 1889, John Burton filed an application for a hearing, alleging that Henry Howe, the entryman, entered into a conspiracy with one Chas. F. Howe, his son, to gain and hold possession of said tract unlawfully, by means of the son entering the Territory before the hour of opening and occupying the land in dispute, and the subsequent surrender of the land to the father, Henry Howe, in pursuance of such unlawful collusion and fraud.

September 24, 1889, Burton filed an additional affidavit in the case alleging that contestants Robb and Woodruff were each disqualified by reason of having been in the Territory, during the prohibited period, in violation of law.

November 2, 1889, Burton filed a supplementary affidavit in which he reiterated the charges heretofore set forth, and asked that all of the said causes should be tried at one hearing.

On November 27, 1889, Burton filed an additional affidavit in which he set forth his former charges more specifically.

On February 16, 1891, the case was heard, all parties being present except contestant Robb who was adjudged to be in default, and her contest was dismissed; but subsequently, to wit, on February 17, 1891, her contest was, by the consent of all the parties interested, reinstated on an agreed statement of facts concerning her claim to the land, of which the following is the substance: That she was in the Oklahoma country employed as a domestic in the family of one Somers, (who was in government employ) from 1888 up to and including the 22d of April, 1889; that at 12 o'clock noon of that day she left the residence of her employer and five minutes thereafter entered and located on the land now in question. At the trial the contestant, Woodruff, and the claimant Howe, entered into an agreed statement of facts as to Howe's alleged disqualification.

That prior to the opening of what is known as the Oklahoma country as described in the act of March 2, 1889, and the President's proclamation of March 23, 1889, the decedent was residing in Manhattan, Kansas, and was wholly unacquainted with the lands described in said act of Congress and said proclamation; that his son Chas. F. Howe, had been for some time prior following his vocation of a photographer and

had been within the limits of said lands described in said act and proclamation; that said son wrote to his father, the defendant, after the issuance of said proclamation, describing the Oklahoma country as a fertile and productive country, and that upon said letter, the said entryman left his home in Manhattan, Kansas, and came to Purcell, Ind. Ter. in order to be near the borders of said land on noon of April 22, 1889, the date and time at which said country was opened for settlement; that on the Saturday of April 20, 1889, said Chas. F. Howe learning that his father was in Purcell, came to that point to see him; he not having seen the said entryman for some time prior thereto; that while there in conversation with the said entryman, he, the said Chas. F. Howe, told the defendant that the lands of the Canadian valley were in his opinion, the most productive and fertile portion of Oklahoma, a fact that was openly and notoriously known by all of the settlers upon the borders of the said country; that in said conversation when asked in regard to water and water supplies the said Chas. F. Howe stated that he knew of but one spring in that valley, and that that spring was northeast of the Oklahoma Station, a distance of from three to one and one half miles; and further stated that any of the lands within several miles of said station, and lying within the limits of Oklahoma were fertile, and what he considered good farming land; that this was the extent of any information given to the said defendant; that the defendant entered the Oklahoma country in company with the neighborhood of from eight hundred to one thousand people on what was known as the big train or first train entering said country from Purcell, I. T., which train crossed the boundary of the Oklahoma country after two o'clock noon of April 22, 1889, and arrived at Oklahoma Station some time after two o'clock, in the afternoon of said day; that said defendant jumped from said train near the Oklahoma station on the east side of the track of the A. T. & S. F. R. R. at the time of its arrival, and traveled in a northerly and northeasterly direction for about three-quarters of a mile, searching for a vacant tract, or one upon which there was no signs of settlement; that he there met his son, Chas. F. Howe; that said meeting was entirely accidental, and not by any preconceived arrangement or plan; that said Chas. F. Howe told him that he had staked a claim near the point where they then were, and lying north and east, and the defendant went over to this place in company with Chas. F. Howe, in the neighborhood of what is now known as the SE. $\frac{1}{4}$ of Sec. 27, T. 12 N., R. 3 W., being the tract in dispute; that upon arriving upon said claim the defendant said to his son in substance: I will go on further east and get me a claim if I can, and said son after debating a few moments, said to the father, that he was an old man, and that he, Chas. F. Howe, thought he could get another claim and that he had better take the claim they were on; that the defendant then and there did enter into possession of said claim, commence improvements and from that time has continually resided thereon and improved the same, that his son, Chas. F. Howe, left this tract at that time and went over upon another $\frac{1}{4}$ Sec. of land and made settlement which $\frac{1}{4}$ Sec. he afterwards contested as is shown by the records in the case of Chas. F. Howe v. Samuel S. Beidler involving the NW. $\frac{1}{4}$ of Sec. 27, T. 12 N., R. 3 W.; that there was no collusion, agreement or arrangement to hold this or any other tract of land between the defendant Henry Howe and Chas. F. Howe, farther than above mentioned, and that at the time upon which he entered into the possession of this tract, other parties had been upon the same, and placed stakes with their names written thereon, which settlement was not perfected or land not entered by them.

That no person qualified or disqualified from making an entry in the said Oklahoma was kept off that tract by the action of Chas. F. Howe by force; and that the statement above named is the facts upon which the affidavit of disqualification of Henry Howe is based.

This agreement is to be used in evidence only as between the parties thereto, Frank H. Woodruff and Henry Howe.

Woodruff dismissed from the record his claim to priority of settlement and based his case upon the disqualification of Howe as above set forth.

Burton, in pursuance of his cause of action, sought to introduce as testimony a conversation that had occurred in his office between himself and Howe. This was objected to as incompetent on the ground of its being a privileged communication between attorney and client, and was so ruled by the register and receiver, who refused to allow Burton to divulge what then took place.

On June 19, 1891, the register and receiver rendered their joint decision in favor of Howe, and held for dismissal the contests of Robb, Woodruff and Burton.

Burton appealed on July 18, 1891, with proof of service on Howe and Robb but no evidence of service on Woodruff; subsequently, however, he submitted—on June 8, 1892—affidavit of service on Woodruff through his attorney by leaving a copy in said attorney's office he being unable to make personal service of the same.

June 30, 1891, Woodruff appealed. Robb did not appeal.

On May 10, 1892, your office decision was rendered in which the decision of the local officers was reversed, the entry of Howe held for cancellation, and the preference right of entry given to Woodruff.

On November 26, 1892, this Department refused to issue a writ of certiorari upon the application of Burton.

January 5, 1893, Burton asked this Department to review the decision rendered on his application for writ of certiorari on November 26, preceding.

June 7, 1892, Henry Howe appealed to this Department with proper proof of service, alleging in substance that the decision appealed from was contrary to the law and the evidence. The motion for review by Burton of January 5, 1893, will be passed upon on the merits of the case and for such purpose it will be regarded as an appeal.

On April 4, 1893, John Burton filed an application for a rehearing in this cause upon the ground of newly discovered evidence. It is accompanied by three affidavits, two of which refer to the qualification of Woodruff which, in view of the finding hereinafter set out, it is unnecessary to consider beyond the general question of diligence. The third affidavit refers to the qualification of Howe.

In Hilliard on New Trials, page 495, it is laid down that a new trial will not be awarded on the ground of newly discovered testimony when it appears that the testimony was or ought to have been known to the party before the trial, and no sufficient excuse is shown for not procuring it. There must have been no delay and the proof of diligence must be clear, (and it is added:) This rule is one of great practical importance and binding upon the court.

In the showing here made the applicant states the time at which he became cognizant of the newly discovered testimony upon which he bases his application for a rehearing, to wit, March 27, 1893, and asserts that he knew nothing of such testimony and could not have

known of or furnished it at the day of trial. It may be assumed from his statement that he discovered all of the testimony upon the date above mentioned, which would be remarkable, if true. There is nothing here to show that he has used due diligence. No evidence is given as to the manner in which this testimony was obtained, as affirming the conclusion of law that the applicant had used due diligence; on the contrary there is nothing here to indicate that the affiants were not personally known to the applicant at the time of trial and that this evidence might not then and there have been obtained. The affidavit of the applicant for a rehearing should contain statements of fact for the consideration of the Department, rather than conclusions of law. It is not with him to decide whether he has used due diligence; the fact must appear affirmatively. This it does not do in the case at bar and the motion for a rehearing is hereby refused.

July 6, 1892, Jacob W. Ragon appealed from the decision of the register and receiver refusing to allow him to make entry for the land in controversy. The said appeal is directed to the Commissioner of the General Land Office and is hereby returned for your consideration.

The claim of Robb was not prosecuted by appeal and she is not now before the Department.

Burton, as has been before said, sought to bring into evidence a conversation alleged to have taken place between himself and the entryman Howe. The register and receiver refused to allow this as they ruled the matter to be privileged. In this they violated rule 41 of practice, which provides as follows:

No testimony will be excluded from the record by the register and receiver on the ground of any objection thereto, but when objection is made to testimony offered, the exception will be noted and the testimony with the exceptions will come up with the case for the consideration of the Commissioner. Officers taking testimony will, however, summarily put a stop to obviously irrelevant questioning.

The latter clause certainly does not refer to evidence of this character, because the evidence of such statements as the defendant might have made to his attorney most assuredly would not have been irrelevant however much of the nature of a privileged communication it may have been. The evidence of Harry Brown is to the effect that the conversation referred to was not of a confidential nature, but I agree with the local officers that the preponderance of the testimony shows that the relation of attorney and client had been established between Burton and Howe and that the testimony, if it were now in the record, ought not to be considered in connection with or determine the issues of this cause. The effort of Burton to introduce the testimony of Charles Howe procured by Henry Howe was clearly not competent as such evidence was the personal right of the defendant. Thus it follows that Burton has failed to introduce competent authority in support of his claim which leaves Woodruff and Howe as the only parties now to be considered.

The agreed statement of facts upon which these two parties went to trial is somewhat vague and indefinite. After a careful study of its terms, it appears that the ground of disqualification of Henry Howe rests on these facts: That his son Charles Howe wrote to his father to come to the Territory and take a claim; that on April 20, he, the son, went outside of the Territory and met his father at Purcell and then told him that the lands of the Canadian Valley were in his opinion the most productive and fertile—a fact that was generally known; that when asked about water he told his father that the only spring he knew of was distant from one and a half to three miles northeast of Oklahoma Station.

It can not be maintained here by Woodruff that the meeting between the father and son was the result of any agreement or fraud for the exact reverse is stipulated. Nor can it be said that the entryman took the land as a result of a previous understanding between the claimant and his son, for the agreement shows that when Henry Howe and Charles Howe reached the land in controversy, Henry Howe said: "I will go on further east and get me a claim, if I can," and that Charles Howe, after deliberating a moment, said to his father that he was an old man, and that he, Charles Howe, thought he could get another claim, and that he (Henry Howe) had better take the claim they were on.

The statement further says—"that there was no collusion, agreement or arrangement to hold this land or any other, between the defendant Henry Howe and Charles F. Howe, further than above mentioned." But this latter clause can not mean that the defendant and Charles Howe met by agreement near the station, for it is stipulated otherwise, nor was the son holding the land for his father, for the conversation just quoted makes it appear to have been the result of an offer made upon the spot; otherwise what was the object in having the conversation set out.

Therefore it follows that the ground of disqualification urged against the entryman is confined to the information given by the son to the defendant at Purcell on April 20, and when such information is duly weighed it appears to reduce the whole statement to the single matter of Charles Howe's having told his father where there was a certain spring, and the distance—decidedly vague—and general direction to take from the railway station. Whatever may be the true facts in this case, it is evident that Woodruff, by his agreement to the facts hereinbefore set forth, has shown that Howe is not thereby disqualified from making a homestead entry. The information as given by Charles Howe is too indefinite and vague to have been of much service to the defendant. It was notorious that the land in the immediate neighborhood of this claim was the most fertile in the Territory and the information about the spring was the only portion of the agreement that at all tends to show that Henry Howe received any undue advantage over those who, like himself, were on the line awaiting the hour of

opening. Such knowledge, then given, does not amount to a disqualification of Howe to make entry; therefore it follows that the decision appealed from was in error and the same is hereby reversed. This decision will not be construed as determining Howe's rights as against the government.

Approved:

JOHN I. HALL,

Assistant Attorney-General.

RAILROAD LANDS—ACT OF JANUARY 13, 1881.

HORNER *v.* NORTHERN PACIFIC R. R. CO.

The right of purchase provided by the act of January 13, 1881, is intended only for the protection of those who settled under the company's license, and where the lands so settled upon are subsequently restored, and the company's title fails.

Secretary Smith to the Commissioner of the General Land Office, February 3, 1894.

(F. W. C.)

I have considered the appeal by Emanuel Horner from your office decision of December 14, 1883, denying his application to purchase, under the act of January 13, 1881 (21 Stat., 315), the NE $\frac{1}{4}$, Sec. 23, T. 15 N., R. 42 E., Walla Walla land district, Washington.

Said tract is within the indemnity limits of the grant for the Northern Pacific Railroad Company, and I learn, upon inquiry at your office, that it was selected by the company March 20, 1884, and that Horner's application, now under consideration, is the only adverse claim to that of the company under its selection referred to.

Horner's claim to the right of purchase under said act is based upon the ground that he settled upon the land in 1878 under the company's license while it was withdrawn upon the map of amended general route filed February 21, 1872, and as it fell without the granted limits upon the definite location of the road, he claims it was therefore restored and he is entitled to purchase.

It is unnecessary to go into a discussion of the claim made, suffice it to say that the company is claiming the land and may receive patent therefor under its selection made as before stated. In that event Horner may perfect title through the company.

It is plain that lands in the condition described are not subject to purchase under said act, which is only intended to provide a means for the protection of those who settled under the company's license where the lands are afterwards restored and the company's title fails.

Your decision is affirmed.

Approved:

JOHN I. HALL,

Assistant Attorney-General.

INDIAN LANDS—EXECUTIVE WITHDRAWAL.

HENRY F. BRUNE.

Tracts included within the executive withdrawal of lands for the protection of the Yakima Indians in their fishing privileges, not necessary thereto, should be released from such reservation; and to that end an examination of the lands so withdrawn is directed.

Applications to enter, heretofore rejected on account of such reservation, may be allowed in the event that the lands so applied for are restored to settlement and entry.

Secretary Smith to the Commissioner of the General Land Office, February 3, 1894.

(G. C. R.)

Henry F. Brune has filed a motion for "a rehearing and review of departmental decision of August 31, 1892, involving the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 6, T. 2 N., R. 14 E., Vancouver land district, Washington.

It appears that your office had held for cancellation his pre-emption cash entry for said land, on August 28, 1891, for the reason that the same was withheld from entry by white men by direction of the Department, dated May 25, 1888, on account of the claims of the Indians to fishing privileges, guaranteed to them under the provisions of the treaty of June 9, 1855 (12 Stat., 951), and the Department, in the decision sought to be reviewed, affirmed that judgment.

It is insisted that said departmental decision is erroneous, because:

1. The tract in question was at the time Brune settled upon it a part of the public domain, subject to entry, etc, and could only be defeated by his failure to comply with the law, or by showing a prior right in some other settler on the tract.

2. That the land department having accepted his proof as a satisfactory compliance with the law, and having received and retained his money, has no jurisdiction to suspend his entry, in the absence of fraud or a contesting settler.

3. That the order of the Honorable Secretary of the Interior, issued May 25, 1888, directing that the township, which includes this tract, be withdrawn from entry by white men, was without warrant of law and is void.

4. That if the departmental order of May 25, 1888, was in other respects authorized and valid, it came too late to disturb the right of entryman Brune as a prior pre-emptor of the land.

5. That the tract being a long way from Columbia River, and about one thousand feet above the water surface of said stream, could in no way facilitate the enjoyment of the Indians in exercising their fishing privileges, guaranteed to them by the provisions of said treaty; that the tract was not considered in said treaty, nor was it reserved in the treaty from the whites.

6. That no Indian or tribe of Indians claims the tract or any part of it under any treaty.

The treaty with the Yakima Nation of Indians, concluded June 9, 1855, ratified by the Senate March 8, 1859, and proclaimed by the President April 10, 1859, gave those Indians "the right of taking fish at all usual places in common with the citizens of the territory, and of erecting temporary buildings for curing them."

Although the land in controversy is beyond and to the south of the Yakima reservation, as it now exists, yet, under the terms of the treaty above quoted, the Indians were guaranteed the right of taking fish "at all usual and accustomed places," and the Columbia river, to the extent at least in which it ran through the territory ceded by the treaty of June 9, 1855, was contemplated as of the "usual and accustomed places" where the Indians had the right to fish. This right to fish necessarily carried with it the right to the use of so much of the land bordering on the river as was needful to the exercise of the privileges thus conferred, and imposed upon the government the duty of reserving from sale or disposal the land so needed, under the treaty stipulations.

And so the Department, on May 25, 1888, upon the recommendation of your office, directed that all entries attempted to be made by white men in township 2 north, ranges 13, 14, and 15 east, in Klickitat county, Washington, be refused until further orders by the Department. This action was taken on the report of George W. Gordon, special Indian agent, who recommended that entries be not permitted on the lands above described, on the grounds that "when white men get possession of lands containing any of the fisheries, they deny the pre-existing treaty right of the Indians, and so trouble begins." This agent also recommended that applicants seeking to enter lands bordering on the Columbia river, in the townships above described, should be required to make affidavit as to whether such lands do or do not contain a fishery.

Upon the report of Special Indian Agent George P. Litchfield, dated September 24, 1891, the Acting Commissioner of Indian Affairs, on May 12, 1892, recommended that the departmental order of May 25, 1888, allowing no further entries in townships 2 north, ranges 13, 14 and 15 east, Vancouver district, be so modified as to restore to the public domain all the odd-numbered sections in those townships, except sections 19, 17 and 13 in township 2 north, range 14 east, and section 25, township 2 north, range 13 east; and, acting on this recommendation, the Department, on May 14, 1892, so modified the order, and advised your office.

The departmental orders of May 25, 1888, and of May 14, 1892, were thus based upon reports of special Indian agents, and these reports and recommendations were accompanied by a statement of facts relative to the fishing privileges of the Indians, and of the necessity of with-

holding the lands from settlement and entry that such privileges might be enjoyed under the terms of the treaty.

In this connection, it is noted that Agent Litchfield specially recommends that all vacant lands, situated in sections 19, 17 and 13 in township 2 north, range 14 east, and section 25, township 2 north, range 13 east, be reserved for the benefit of the Indians, "so long as they desire the same," and he makes a similar recommendation as to section 14, township 2 north, range 14 east, and section 18, township 2 north, range 15 east.

Whether by specifically naming the above sections, he intended it to be inferred that other undisposed of sections in township 2 north, range 14 east, did not contain lands on or near the Columbia river that were "usual or accustomed fishing places," it can not be determined; but he did not mention section 6 in that township as one proper to be reserved, while he did mention section 14 in the same township that had already been reserved.

The land in question is situated in section 6 in that township (2 north, 14 east), and it is shown by three affidavits sent up with this motion that the land is situated three miles distant from the nearest point to the Columbia river, and is about one thousand feet above the surface of that stream; that no Indian or any other person claims the land. If this tract of land does not border on the river, and is not of service to the Indians in the exercise of their fishing privileges, the reason for its reservation by departmental order of May 25, 1888, disappears; and in that case the order suspending Mr. Brune's entry should be revoked.

A hearing therefore should be ordered before the register and receiver to determine the true facts relative to the situation of this tract—whether it is in any way necessary to the treaty rights guaranteeing the Indians fishing privileges; whether the tract in question is so situated that its ownership and control by the claimant would interfere with the free access to the waters of the Columbia river by the Indians in the exercise of their rights of fishing in their "accustomed places." The Indians should be represented at this hearing, and to that end I have caused a copy of this decision to be transmitted to the Commissioner of Indian Affairs, with directions that an agent of his bureau be present at the hearing and represent the Indian tribe.

It will be noted that the departmental order of May 25, 1888, suspended all the government lands in township 2 north, ranges 13, 14, and 15 east, in said district, and that on May 14, 1892, there were restored to the public domain all the odd numbered sections within said township, except sections 19, 17 and 13 in township 2, range 14, and section 25 in township 2, range 13 east.

In addition to the duties imposed upon such agent at the hearing herein ordered, he should be directed to make a thorough examination of the several tracts in said townships, remaining under suspension

for the purposes above indicated, taking such testimony as may be needful to accuracy in the report, with a view to further action relieving such tracts of land in said townships from suspension as may not have been contemplated in the treaty stipulations, above alluded to.

On December 8, 1892 (15 L. D., 541), the Department affirmed the action of your office rejecting the application of John C. Crawford to make homestead entry of the SW. $\frac{1}{4}$ of sec. 4, T. 2 N., R. 14 E., Vancouver land district, Washington. This action was taken in view of Agent Litchfield's report, recommending that the order of May 25, 1888, remain in force as to all even numbered sections in said townships and the four odd numbered sections mentioned by him, "until further investigation could be made."

It is possible that a careful examination of the lands bordering on the river, and a report thereon as to those tracts needful to the Indians in carrying out the treaty stipulations, may result in releasing from suspension the tract Mr. Crawford applied to enter; if so, his application and all others in the same condition may be allowed, and other tracts remaining under suspension and not yet applied for, and not needed as aforesaid, be opened to settlement and entry.

The departmental decision, review of which is sought, is modified, and the entry will remain suspended, awaiting the final determination of the questions involved upon the hearing.

The agent detailed to be present at the hearing will report to the register and receiver, who should be directed to fix such time for the hearing (as early as practicable) as may be convenient for the parties interested.

Approved:

JOHN I. HALL,

Assistant Attorney-General.

PRACTICE—CERTIORARI—RULE 85 OF PRACTICE.

DENMAN *v.* DOMENIGONI.

An application for a writ of certiorari may be allowed where the appeal is dismissed because taken out of time, and it is shown that the applicant was misled, as to the time allowed for appeal, by the action of the General Land Office.

Rule 85 of Practice does not operate as a limitation on the time within which an application for certiorari may be made.

*Secretary Smith to the Commissioner of the General Land Office,
February 3, 1894.*

(G. B. G.)

On January 6, 1893, your office, in the case of S. Z. Denman *v.* Antonio Domenigoni, rendered a decision adverse to the homestead entryman Domenigoni, in the matter of his claim for lots 5 and 6 of Sec. 6, T. 6 S., R. 1 W., S. B. M., Los Angeles land district, California, and held

for cancellation his homestead entry No. 6802, for said land, and it appears that Messrs. Brainard and Le Barnes, of Washington, D. C., attorneys for defendant, were duly notified of said decision by your office letter of the same date.

On February 13, 1893, a motion for review of said decision was filed in the local office at Los Angeles by C. Cabot, the original attorney of record for the said Domenigoni, and the same was forwarded, together with other papers, to the General Land Office February 25, following. April 17, 1893, said motion for review was denied, and the said Brainard and Le Barnes were duly notified of same by your office letter of the same date.

On May 23, 1893, Messrs. Brainard and Le Barnes filed an appeal for the said Domenigoni from your said office decision of January 6, 1893, which was rejected for the reason that more than sixty days had elapsed from the date of service of notice of said decision, excluding the time between the filing of the aforesaid motion for review, and the notice of the decision upon said motion.

On July 20, 1893, the said attorney Cabot filed for Domenigoni in the local office an application for a writ of certiorari. It does not appear when this application was received at the General Land Office, but it was transmitted from the local office by letter of July 27, 1893, and was forwarded to the Department from your office August 11, 1893.

The grounds upon which the application for a writ of certiorari herein is based, are briefly, that the decision of your office of April 17, 1893, sets forth that the service of notice of the decision of January 6, 1893, was made upon counsel for Domenigoni on January 23, 1893, and that by taking action upon the motion for a review, filed by said Cabot on February 13, 1893, and rendering a decision thereon, your office accepted that as the date when service of notice of said decision of January 6, 1893, was made upon said Domenigoni, and that because of said statement in said decision, and the action of your office in keeping therewith, that applicant was misled as to the time within which his right of appeal from said decision of January 6, 1893, would expire.

This contention appears to import verity. That part of your office decision of April 17, 1893, alleged to have been misleading and prejudicial, is as follows:

REGISTER AND RECEIVER,

Los Angeles, Cal.

GENTLEMEN:—Under date of February 25, 1893, you transmitted a motion, filed in your office by counsel for defendant Domenigoni on February 13, 1893, for a review of my decision in the above entitled case, rendered January 6, 1893; and also proof of due service of my said decision, on counsel for Domenigoni, on January 23, 1893.

It will be readily perceived that although, as a matter of fact, notice of said decision was given to Messrs. Brainard and Le Barnes on January 6, 1893, yet it was not executed on Cabot, the original counsel of record, until January 23, 1893, and while the notice to Brainard and

Le Barnes was all sufficient under the rules, yet your office seems to have recognized the date of notice to Cabot as the time from which limitation should run; otherwise the filing of said motion for review was too late, and ought not to have been considered, and it is altogether probable that the said Domenigoni was misled thereby. It follows that if the application for certiorari herein was in all respects regular, that the writ should be allowed.

An application for certiorari may be allowed on behalf of a party whose failure to appeal in time is due to a mistake that is satisfactorily explained, and where such action will not result in injury to innocent parties. *Dean v. Simmons* (15 L. D., 527).

Since the filing of the application for writ of certiorari herein, attorney for Denman has filed a brief for the said contestant, and urges that said application should be denied for two reasons, only one of which need be noticed here.

It is contended that this application is itself too late—notice of decision was given to the attorneys who filed the appeal, July 1, 1893, at Washington. The motion or application for certiorari must be filed in the General Land Office, not in the local office, within twenty days.

Without considering the question as to whether a filing in the local office of an application for a writ of certiorari, is a filing in the General Land Office, within the meaning and spirit of the law, it is sufficient, in my judgment, that Rule 85 of Practice does not operate as a limitation on the time within which an application for certiorari may be made. Said rule provides that

when the Commissioner shall formally decide against the right of appeal, he shall suspend action on the case at issue, for twenty days from notice of his decision, to enable the party against whom the decision is rendered, to apply to the Secretary for an order in accordance with Rules 83 and 84.

Rule 85 is a limitation on the time within which the Commissioner of the General Land Office is required to suspend action on the case at issue, and after the expiration of that time, if writ of certiorari has not been applied for, your office might take such action as would preclude the granting of the writ, but where there is no evidence that such action has been taken, I find no authority in the Rules of Practice to deny the application.

The application in this case should be allowed. You are therefore directed to certify the record herein, to the Department for its consideration.

Approved:

JOHN I. HALL,

Assistant Attorney-General.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

MILLER *v.* BOWE.

The confirmation of an entry under section 7, act of March 3, 1891, is not defeated by fraud on the part of the entryman and his immediate transferee where the land is subsequently, and prior to March 1, 1888, sold to a bona fide purchaser; nor does the pendency of a contest prevent such confirmation.

Secretary Smith to the Commissioner of the General Land Office, February 3, 1894.

(C. W. P.)

The controversy in this case involves the title to the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 20, T. 1 N., R. 6 E., Otoe and Missouri reservation, Beatrice series, Lincoln, Nebraska.

June 3, 1883, Russell L. Bowe received a final certificate of purchase for the above described tract of land. On contest of Jacob B. Miller, filed June 22, 1886, against the cash entry of said Bowe, alleging "that Bowe was not at the time of such entry or purchase, and did not afterwards become, nor ever has been since said entry or purchase, an actual settler upon said tract of land," your office held said cash entry for cancellation. Thereupon, the entryman appealed to the Department, where, on December 2, 1890, the decision of your office was affirmed, and the entry directed to be canceled, which was done. On review, this Department, on July 24, 1891, held that Bowe's entry was *prima facie* within the provisions of the act of March 3, 1891, and remanded the case to your office, with directions to proceed in accordance with the instructions to Chiefs of Division, dated May 3, 1891, (12 L. D., 450).

August 24, 1891, your office called on the holders of the land, and interested parties therein, under conveyance from Bowe, to furnish the proof provided for by said letter of instructions, showing that the entry of Bowe was confirmed by said act of March 3, 1891. In response to this call, the transferees furnished evidence in support of their case; after considering the evidence, on June 27, 1892, your office dismissed the contest of Miller, and held the entry confirmed. Contestant appealed. September 27, 1892, the attorney for Bowe filed a motion to dismiss said appeal; December 30, 1892, said motion was overruled and dismissed.

The case now comes before the Department on the appeal from the decision of your office of June 27, 1892, dismissing the contest.

The evidence shows, that, on April 4, 1883, Bowe and wife executed, and on or about the 9th day of August, 1883, delivered to A. M. Norris a warranty deed for said land. January 29, 1886, Norris and wife conveyed the same to John D. Lohman. October 20, 1887, Lohman and wife conveyed the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ to James J. Bristor, and December 20, 1887, Lohman and wife conveyed the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ to Eliza J. Bristor. December 29, 1887, the said James J.

Bristor mortgaged the said N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ to the said Lohman, to secure the purchase money, December 30, 1887, the said Eliza J. Bristor and husband mortgaged the said NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ to the said Lohman, March 7, 1889, Lohman released said mortgage to said Eliza J. Bristor and husband. February 25, 1890, the said Eliza J. Bristor and husband conveyed said NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ to James Colgrove, subject to a mortgage of \$2000 to John and George Christie, and a mortgage of \$150 to Smith Brothers Loan and Trust Company. The evidence further shows that the land has not been reconveyed to Bowe; that the present owners of the land are bona fide purchasers for value; and that the mortgages to George and John Christie, and to Smith Brothers Loan and Trust Company, as well as the mortgage to Lohman, are wholly unpaid.

I agree with your finding, that Norris had knowledge of the fraud in the entry; but that it is not shown that the subsequent purchasers had such knowledge, and in their affidavit they deny it. The 7th section of the act of March 3, 1891, (26 Stat., 1095) is held to confirm an entry fraudulent in its inception, transferred by a fraudulent transferee, prior to March 1, 1888, when at the date of the transfer the subsequent transferee is a bona fide purchaser for value, without notice of the fraud or violation of the law on the part of the entryman, and no adverse claim originating prior to entry exists, and that the pendency of a contest does not defeat such confirmation. *Shepherd v. Ekdahl* (13 L. D., 537).

No adverse claim, originating prior to final entry, exists, and the transfers, except the one to Norris, were made in good faith, and for a valuable consideration.

The judgment of your office in the case is therefore affirmed.

Approved:

JOHN I. HALL,

Assistant Attorney-General.

HOMESTEAD ENTRY—APPLICATION—MARRIED WOMAN.

HAMILTON *v.* HARRIS ET. AL. (ON REVIEW.)

A legal application to enter, pending on appeal, operates to reserve the land for the benefit of the applicant until final action thereon.

An application to make homestead entry, by a single woman duly qualified under the homestead law, and erroneously rejected, may be thereafter allowed on appeal as of the date of the application, notwithstanding the fact of the applicant's subsequent marriage.

Secretary Smith to the Commissioner of the General Land Office, February 3, 1894.

(S. C. T.)

On the 1st of May, 1893, Charles T. Brewer filed in the local land office at Seattle, Washington, motion for review of the decision of the Department rendered on the 15th of March, 1893 (16 L. D., 288), in the

case of Alexander Hamilton against Mrs. S. B. Harris, formerly Mrs. Dunlap, and the said Brewer. The decision complained of was in favor of Mrs. Harris, and on the 4th of May, 1893, Hamilton also filed in the local office, a motion for the review thereof. These motions were transmitted by your office to the Department on the 20th of May, 1893.

The land involved in the controversy is the NW. $\frac{1}{4}$ of Sec. 28, T. 28 N., R. 5 E., in said land district, for which Dennis O'Leary made homestead entry on the 14th of April, 1888. His entry was canceled, as the result of a contest brought by the former husband of Mrs. Harris (Dunlap), who built a house and made valuable improvements on the land. He was living thereon at the time of the cancellation of O'Leary's entry, but before he exercised his preference right of entry, he was accidentally killed by a falling tree. His widow filed her pre-emption declaratory statement for the land on the 21st of August, 1889, alleging settlement on the first of June, of that year.

On the 25th of June, 1890, Charles Ott made homestead entry for the tract. Mrs. Dunlap offered final proof on the 18th of October, 1890, when Alexander Hamilton filed a protest, alleging that she had failed to comply with the law, in the matter of residence and cultivation. This protest was in the interest of Ott, who had not the means necessary to carry on a contest.

The hearing resulted in the rejection of her final proof, by the local officers, who recommended that her declaratory statement be canceled, and the land held subject to the homestead entry of Ott. Before such decision was rendered, Mrs. Dunlap filed an affidavit of contest against the entry of Ott, alleging failure to settle upon and cultivate the land, that the entry was made for speculative purposes, and that he had sold his rights in the land, and relinquished his entry. Such contest affidavit was filed on the 26th of February, 1891.

On the 5th of May, 1891, Hamilton presented his soldier's declaratory statement for the land, which was "refused because the tract applied for is included in the homestead entry of Charles Ott, and also in the pre-emption declaratory statement of Sarah B. Dunlap, on which final proof has been made, and which is now pending on appeal from office decision in the case of Hamilton v. Dunlap." From this action by the local officers, Hamilton appealed.

A hearing was appointed upon the contest affidavit of Mrs. Dunlap against the entry of Ott, the date therefor being fixed for July 8, 1891. Ott accepted service of notice therefor, on the 22d of May, 1891, and on the same day Mrs. Dunlap presented her application to make homestead entry for the land, together with the relinquishment of Ott, executed that day. Her application was "suspended, pending appeal of Hamilton from refusal of his soldier's declaratory statement." Mrs. Dunlap appealed from this action on the part of the local officers.

On the 26th of May, 1891, Hamilton presented a relinquishment of the entry of Ott, executed by the entryman on the 16th of October,

1890, and also affidavits by himself and Ott, in which Hamilton swore that he paid a valuable consideration for said relinquishment, and had had the same since its date, and Ott swore that his relinquishment given to Mrs. Dunlap was procured by fraud and misrepresentation.

On the 9th of November, 1891, a decision in the case was rendered by your office, in which it was held that the local officers were justified in declining to accept the soldier's declaratory statement of Hamilton; that the final proof of Mrs. Dunlap on her pre-emption filing should be rejected, and her filing canceled; that the homestead entry of Ott should be canceled, "with the right of Mrs. Dunlap to make homestead entry for the land."

Hamilton filed a motion for rehearing, which was denied by your office on the 23d of April, 1892. From said action in the case Hamilton appealed.

On the 26th of January, 1892, Charles T. Brewer applied to make homestead entry for the tract. His application was refused by the local officers "because the tract applied for is embraced in the application of Sarah B. Dunlap to enter as a homestead, and the application of Alexander Hamilton to file a soldier's declaratory statement, and now pending." He appealed, and your office affirmed the action of the local officers, on the 23d of April, 1892. From such decision he appealed to the Department.

It was upon the appeals of Hamilton, and of Brewer, that the Department rendered its decision of March 15, 1893, which I am asked to review. The action of your office, sustaining the local officers in rejecting the application of Brewer to make homestead entry for the land, was approved, and said decision in reference to the rights of Hamilton and of Mrs. Dunlap in the tract was affirmed.

The first section of the act of May 14, 1880 (21 Stat., 140), provides that when a written relinquishment of an entry or filing is filed in the local office, "the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office." Giving that provision its full force and effect, the land in question was open to settlement and entry on the 22d of May, 1891, after Mrs. Dunlap had filed Ott's relinquishment of his entry, and when she presented her application to make homestead entry for the tract. The fact that she was then a qualified homesteader is not denied or questioned.

While the Department holds that an application to enter land not subject to entry at the time the application is made, confers no rights upon the applicant, (*Rumbley v. Causey*, 16 L. D., 266), it also holds, that a legal application to enter land subject to entry, while pending, is equal to actual entry, so far as the applicant's rights are concerned, and withdraws the land embraced therein from any other disposition, until final action thereon. (*Pfaff v. Williams, et al.*, 4 L. D., 455).

It follows, therefore, that Mrs. Dunlap's legal application to enter

this land as a homestead, on the 22d of May, 1891, and her appeal from its rejection by the local officers, withdrew the land from any other disposition, until final action was taken upon her appeal, which was that taken by the Department in the decision complained of. It also follows, that the application of Brewer to enter the land, made during the pendency of Mrs. Dunlap's appeal, was properly rejected.

The application of Hamilton, to file his soldier's declaratory statement for the land, during the pendency of Ott's entry, is disposed of by the rule laid down in the *Rumbley v. Cansey* case, already cited.

Both motions for review could therefore be disposed of under the rule laid down in *Mulligan v. Hansen* (10 L. D., 311) wherein it was said that "unless it clearly appears that manifest injustice has been done, a motion for review will not be granted," were it not for the fact that Hamilton and Brewer each raise the question that the decision of the Department was erroneous, in allowing Mrs. Dunlap (now Mrs. Harris), to make entry for the land as of May 22, 1891. It is contended that her marriage, subsequent to her application, disqualified her as a homesteader.

I recognize the force of this position, but it must be remembered that had her application been allowed when presented, instead of being improperly rejected, her entry would have been a matter of record at the time of her marriage, and she would then have been allowed to complete the entry by compliance with law, notwithstanding her marriage.

I do not think her rights should be abridged by the improper action of the local officers, in rejecting her legal application to make entry for the land. In the case of *Hattie E. Walker* (15 L. D., 377), it was said: "The Department has repeatedly held that an entrywoman loses no right acquired under the homestead law, merely by her marriage, provided that after marriage, as before, she continues to comply with the law." A number of cases are cited in support of that doctrine. (See, also, *Bomgardner v. Kittleman*, 17 L. D., 207).

With the facts of the case as already stated, and with the law applicable to such facts, as herewith cited, I think it may be safely said that the legal application of Mrs. Dunlap, made on the 22d of May, 1891, conferred upon her the same rights in the land in question, as though she had that day made entry therefor. Also, that her subsequent marriage did not, of itself, prevent her from securing title to the land.

In the case of *Margaret D. Bailey* (11 L. D., 366), it was held that a married woman may be permitted to make a pre-emption entry, with a view to its equitable adjudication, where the proof shows that she had duly complied with the law in the matter of filing, residence, and improvements prior to her marriage. In support of this position, the case of *Mary E. Funk* (9 L. D., 215), and of *Emma McClurg* (10 L. D., 629), are cited.

Those were cases under the pre-emption laws, where acts of settle-

ment, filing and residence were requisite before entry could be made. Under the homestead law, however, *entry* is the first act towards securing title, (except where the right is based upon settlement) and settlement and residence are not required, until after the application to enter has been allowed.

Under her homestead application, therefore, Mrs. Dunlap was not required to establish her residence upon the land until within six months after notice that her application had been allowed, by the decision of the Department of March 15, 1893.

She was not in default so long as her legal application was "pending," and therefore it must be said that she had complied with the law, up to the time of her marriage. As that event, of itself, did not deprive her of the right to complete her entry, she must be allowed to show a further and full compliance with the law, and upon doing this, she may secure title to the land.

If, for reasons other than those herein considered, she should be found disqualified from completing her entry, or for any cause should fail to do so, the respective rights of Hamilton and of Brewer to the land in question, must be adjudicated by proceedings regularly instituted for the settlement of such rights. The motions for review are denied.

Approved,

JOHN I. HALL,

Assistant Attorney General.

OKLAHOMA HOMESTEADS—COMMUTATION.

INSTRUCTIONS.

Commutation proof submitted under the act of October 20, 1893, should show compliance with law to the date of said proof.

Secretary Smith to the Commissioner of the General Land Office, February 14, 1894. (F. W. C.)

I am in receipt of your letter of December 22, 1893, submitting for my approval, draft of a proposed circular of instructions under the act of Congress approved October 20, 1893, entitled "An act granting to settlers on certain lands in Oklahoma Territory the right to commute their homestead entries and for other purposes."

The second section grants the right of commutation after a period of twelve months from date of entry upon a showing of compliance with the homestead laws.

It is undoubtedly contemplated by such legislation that the party shall show compliance with law to the date of the offer of proof in support of his application to commute, and I have amended the instructions by inserting after "homestead settlement," the following: "to the

date of proof," so as to read "by showing a compliance with all the laws relating to such homestead settlement to the date of proof."

With this modification I approve of the instructions which are herewith returned.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

OKLAHOMA LANDS—EXTENSION OF TIME FOR PAYMENT—COMMUTATION.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., February 14, 1894.

REGISTERS AND RECEIVERS,

Kingfisher, Oklahoma and Woodward, Oklahoma Territory.

GENTLEMEN: Your attention is called to the provisions of the act of Congress, approved October 20, 1893, entitled "An act granting settlers on certain lands in Oklahoma Territory the right to commute their homestead entries, and for other purposes," a copy of which is hereto attached.

The first section extends the time for the first payment required of the homestead settlers on the Absentee Shawnee, Pottawatomie and Cheyenne and Arapahoe lands so that the same will not be due until three years from the date of the original homestead entry. In carrying out the instructions contained in the circular of June 8, 1893, 17 L. D., 52, you will be governed accordingly, remembering that said instructions are not applicable in cases where parties avail themselves of the privileges conferred by section 2 of the act under consideration.

Section 2 of said act allows parties who have made homestead settlement upon the Absentee Shawnee, Pottawatomie and Cheyenne and Arapahoe lands, and the Public Land Strip, to obtain patent therefor, at the expiration of twelve months from the date of locating upon said homestead, by showing a compliance with all the laws relating to such homestead settlement to the date of proof and paying for the lands so entered at the rate of one dollar and fifty cents per acre for Absentee Shawnee, Pottawatomie, and Cheyenne and Arapahoe lands, and one dollar and twenty-five cents per acre for lands in the Public Land Strip. Applicants to purchase under this provision will be required to furnish evidence of naturalization, the same as in five year proof, under section 20, act of May 2, 1890 (26 Stat., 81).

Applications to purchase, under this section, will be made upon form 4-001. Such applications the register will retain in this office. See section 2355, Revised Statutes.

A cash certificate and receipt forms 4-189 and 4-131, respectively, will be issued, if the proof is satisfactory, and the same will be reported upon the regular abstract of lands sold. The proof and final affidavit in such cases, will be made upon the regular homestead blanks, modified as the circumstances require, and, in each case, you will require the party to make an affidavit of form 4-102 c, properly modified.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,
HOKE SMITH,
Secretary.

(PUBLIC—No. 5.)

AN ACT Granting settlers on certain lands in Oklahoma Territory the right to commute their homestead entries, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the homestead settlers on the Absentee Shawnee, Pottawatomie, and Cheyenne and Arapahoe Indian lands, in Oklahoma Territory be, and they are hereby, granted an extension of one year within which to make the first payment provided for in section sixteen of the act of Congress approved March third, eighteen hundred and ninety-one, entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and ninety-two, and for other purposes," and such payment may be made at any time within three years from the date of the entry of such lands.

SEC. 2. That any person entitled by law to take a homestead in said Territory of Oklahoma who has already located and filed upon, or who shall hereafter locate and file upon a homestead within any of the lands in the Absentee Shawnee, Pottawatomie, and Cheyenne and Arapahoe Indian lands and the Public Land Strip in Oklahoma Territory, and who has complied with all the laws relating to such homestead settlement, may receive a patent therefor at the expiration of twelve months from the date of locating upon such homestead, upon payment to the United States of one dollar and fifty cents per acre for the land embodied in such homestead: *Provided* That homestead settlers in the Public Land Strip now Beaver County, Oklahoma, may receive such patent upon the payment to the United States of the sum of one dollar and twenty-five cents per acre.

SEC. 3. That all acts in conflict with this act are hereby repealed.

Approved, October 20, 1893.

PRE-EMPTION—EXTENSION OF TIME FOR PAYMENT.

JOHN MCGRATH.

A loss of crops, through failure to secure a threshing machine, authorizes an extension of time for payment, provided there is no want of diligence on the part of the claimant.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (J. I. P.)

I have considered the appeal of John McGrath from your office decision of September 7, 1892, denying him an extension of one year from December 23, 1891, because of an alleged failure of crops, in which to pay for the land included in his pre-emption declaratory statement No. 12,526, viz: the NW. $\frac{1}{4}$ of Sec. 9, T. 152 N., R. 58 W., Grand Forks, North Dakota, land district.

His declaratory statement was made March 23, 1889, alleging settlement same day. His final proof, made June 3, 1892, shows him to be a qualified pre-emptor; it also shows continuous residence, and improvements worth \$200 on the tract in question.

His application and affidavit for an extension of time shows that his first crop of ten acres of wheat in 1889 was destroyed by frost; that his second crop, in 1890, of barley was lost because of his inability to find a machine to thresh it, on account of which he was obliged to feed it to his stock; and that his crop in 1891, which was of barley, was lost for the same reason, and that because thereof he had no money with which to pay for said land.

He bases his claim for an extension of time on the provisions of the joint resolution of September 30, 1890 (26 Stat., 684), the provisions of which are as follows—

That whenever it shall appear by the filing of such evidence in the offices of any register and receiver as shall be prescribed by the Secretary of the Interior that any settler on the public lands, by reason of the failure of crops for which he is in no wise responsible, is unable to make the payment on his homestead or pre-emption claim required by law, the Commissioner of the General Land Office is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same becomes due.

Under the circular issued by your office October 27, 1890, (11 L. D., 417), and approved by the Secretary of the Interior, with reference to said resolution, the manner in which an application for extension of time of payment shall be made is set forth as follows—

Any party applying for the extension of time authorized by said resolution will be required to submit testimony to consist of his own affidavit, corroborated, so far as possible, executed before the register or receiver, or some officer authorized to administer oaths in land matters within the county where the land is situated, setting forth in detail the facts relating to the failure of crops, on which he relies to support his application, and that he is unable by reason of such failure of crops to make the payment required by law.

It will be observed that the affidavit of McGrath does not show any failure of crops for the years 1890 and 1891. On the contrary, it shows

that a very fair crop of barley for those years was produced, but was lost as above stated.

The decision of your office appealed from holds, in substance, that his inability to find a machine with which to get his barley crop threshed, and its loss because thereof does not bring him within the provisions of the joint resolution of September 30, 1890, *supra*.

In the case of Nathaniel Woodiwiss (15 L. D., 339), it was shown that the entryman had a failure of crops on 1889 and 1890; that in 1891 his crop of one hundred and five acres of wheat was yet in the shock, and on account of the uncertainty in the weather could not probably be threshed before the ensuing spring; that he was unable to realize anything on said crop; had nothing from his former crop; and asked for an extension of time. It was granted, on the ground that said joint resolution was remedial; that the regulations of October 27, 1890, prescribed the kind of evidence which should be filed, to entitle one to its benefits, which had been done, and that said joint resolution should receive a liberal construction.

Again, in the case of Edward W. Sheldon, (16 L. D., 390), the same ruling, substantially, was made, and it was held "that a settler who is unable, by reason of drouth, to plant a crop is entitled to an extension of time within which to make payment for the land," under the provisions of said joint resolution.

In the case first cited, the last crop was in danger of loss, on account of the improbability of getting it threshed, because of the uncertainty of the weather.

In the case at bar the crop was lost, because a machine could not be had.

In the second case cited, the effect of the conclusion reached is that the crop was lost before sowing on account of drought.

In the case at bar the crop was lost after reaping on account of failure to thresh, as stated. In the first case cited, there was a possibility of no loss whatever so far as the last crop was concerned. In the case at bar, the last two crops were actually lost.

If in the second case cited there was an extension granted for loss of crop before sowing, there is no good reason apparent why it may not be granted in the case at bar for a loss of crop after reaping,—provided always, there is an absence of responsibility on the part of the settler.

As stated in the authorities cited, said joint resolution is remedial and should be liberally construed.

As the settler in this case has shown good faith at all points, and has complied with the regulations of October 27, 1890, as to the evidence to be filed to entitle him to the relief sought, it should evidently be granted.

The decision of your office of September 7, 1892, is therefore reversed.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

GILLEN *v.* BEEBE ET AL.

Motion for review and rehearing (See 16 L. D., 306), considered and denied by Secretary Smith, February 12, 1894.

PRE-EMPTION—SECOND FILING.

GILBERT B. NETTLETON.

The validity of a pre-emption filing that has passed to patent will not be questioned on behalf of one claiming under a second filing made by the same party.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (G. C. R.)

On August 20, 1873, Gilbert B. Nettleton filed his declaratory statement No. 82 for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 11 (not 12), the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 12, T. 2, R. 30, McCook, Nebraska. He transmuted this filing to homestead entry No. 673, upon which final certificate No. 270 issued April 29, 1878, and patent issued therefor December 30, 1878. On March 24, 1884, he filed his declaratory statement No. 420 for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 3 and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 10, same township and range, and made pre-emption cash entry No. 1014 therefor February 5, 1885. This entry was held for cancellation because he had previously exercised his pre-emption right for the land first above described, and on appeal the Department, on January 21, 1889, affirmed that judgment, and the entry was canceled February 8, 1889.

It appears that the entryman mortgaged the land last above described to W. O. McClure, on September 4, 1885, for the sum of \$500. After the entry was canceled, and on May 16, 1891, McClure, as such mortgagee, applied to have patent issued for the land, under the provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095). He stated in affidavit accompanying the application, that—

Although his mortgage deed was placed on record within a reasonable time, in the county where said land was situated, that he was never made a party to any action to set aside the final receipt issued to Nettleton to his knowledge, and that no notice of suspension or defect in said title was ever received by him from the land office, or from any one, until recently, and that he was never granted an opportunity to appear and defend his equity in said land.

He also charged Nettleton with doing all he could to aid in the cancellation of said entry.

Your office, by decision dated April 12, 1892, denied the motion for reinstatement of the entry and its confirmation under said act. A motion for a review was thereafter made, and your office, by decision of October 27, 1892, adhered to its former ruling, and further stated that "Nettleton's cash entry No. 1014, having been canceled by departmental order, this office has no jurisdiction in the matter," and that

McClure's remedy "lies in an application to the honorable secretary for reconsideration of his case."

It appears that after Nettleton's entry was canceled, and on February 13, 1889, Joseph I. Grundy filed his declaratory statement for the same tract, and, on January 7, 1892, he transmuted the same to a homestead entry.

In pursuance of the suggestion contained in your office letter of October 27, 1892, McClure has filed a motion for a reconsideration of said departmental decision of January 21, 1889.

One of the grounds assigned for such reconsideration is: If this applicant could be allowed a hearing, or had he been allowed to show cause at the time why said entry of Nettleton should not be canceled, he could have shown that the first filing of said Nettleton was clearly illegal and not a bar to a subsequent legal filing on the tract in dispute.

There is no pretense at showing in what way Nettleton's first filing "was clearly illegal and not a bar to a subsequent legal filing." His first filing was changed to a homestead entry, and he received patent for the land covered thereby. The Department held, in the decision complained of, that "The right to make pre-emption filing can be exercised but once, and such right is exhausted though the filing be subsequently transmuted into a homestead entry." Alfred E. Sanford (6 L. D., 103).

When a claim is initiated by a filing, and patent is issued to the settler for the land embraced therein, no one will be heard to allege the illegality of that filing, in order to render valid an entry which is based on a second filing.

There is no sufficient reason given for a reconsideration of said departmental decision, and the alleged newly discovered evidence, even if properly before the Department, could not change the results already reached.

The motion is accordingly denied.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

HOMESTEAD CONTEST—SPECULATIVE ENTRY.

EGERT *v.* JONES.

An entry must be held speculative in character, where it appears to have been made without intent to establish and maintain residence on the land in good faith, but to avoid compliance with the statute in such respect, and secure thereby a tract of special value.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (E. M. R.)

I have considered the case of Charles D. Egert *v.* Dewoody R. Jones, on appeal by the former from your office decision of March 18,

1892, sustaining the ruling of the register and receiver in allowing the entry of Dewoody R. Jones, Seattle series, for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 31, and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 30, T. 18 N., R. 10 W., Olympia, land district, Washington.

The register and receiver at Olympia rendered their decision adverse to the plaintiff, February 2, 1891, and an appeal was taken March 12, 1891, and that decision was sustained by your office decision of March 18, 1892.

The record shows that Dewoody R. Jones made entry for this tract September 5, 1888, that shortly thereafter, in October following, the early portion of the month, the said Dewoody R. Jones was nominated by one of the political parties for the position of county auditor, and that, in November of the same year, was duly elected.

On the 24th day of February, 1889, Jones went on the land, having prior to that time had a house built by one in his employ, and from that day up to about March 3d, with the exception of one night, staid upon the said tract; upon the 4th day of March he assumed his duties as county auditor at the county seat. Affidavit of contest was filed January 27, 1890. Prior to going to the county seat, he opened up a trail to his entry, and had about ten acres felled, and cleared a small portion thereof.

The evidence further shows that the said Dewoody R. Jones had been considering being a candidate for auditor prior to making his entry upon the 5th day of September, 1888, and that sometime during this month, subsequent to making his entry, he consented to become the candidate of his party, and the evidence shows that though his immediate predecessor in the office belonged to the opposite party, that the county was considered safe for his party. In addition to this, there is evidence from Jones himself that indicates that he was aware that a company was about to lay out a town near this claim. This, I think, is sufficiently shown by his going up to this neighborhood to make entry upon another tract, his race back to Olympia to the land office, and, upon finding that Mr. Emerson, the President of the Company, was there before him, by his selection of this tract from an examination of the records of the land office.

His wife refused to move on the land. Subsequent to going into office, he visited the land in question three or four times in the year 1889, and in all, prior to this contest, spent about fifteen days upon his entry. He employed a man at \$35 per month who built the house and did the clearing already mentioned. In all, the improvements he put upon the tract, amounted prior to this contest, to about \$875. It is further in evidence that in the interim, up to the filing of this contest, the town of Grays Harbor City had been laid out, and that the limits of the town come close to the tract in question.

The affidavit of contest of Charles D. Egert, after setting forth his personal acquaintance with the land, alleged that Dewoody R. Jones

had "wholly abandoned said tract; that said tract is not settled upon and cultivated by said party, as required by law, and is now in its natural wild state, and that said party has never established his residence thereon, but made said entry for speculative and fraudulent purposes."

Jones' term of office expired January 1, 1891. The only question in this case, it appears, is, whether the acts of Jones, from the 24th of February, 1889, to March 3, 1889, constituted such a residence as is contemplated by the law, and in order to determine this it becomes necessary to pass upon the question of the good faith of Jones.

As the law contemplates no fixed period as of the essence of residence, it follows that it is established the moment one goes upon the land, with the intent of making an immediate segregation of the tract for a home. But the intent must go hand in hand with the acts of settlement. Did he have the intent? Was he actuated by good faith?

A careful review of the testimony shows that Jones, whilst considering being a candidate, made the entry. He was doubtless aware that absence from the homestead, caused by official duties, was excusable under the law. He was also presumably aware that he had six months from date of entry in which to make settlement. In other words, he would not have to make any improvements upon the land until after his election in November, and then he would be relieved from continuous residence by the duties devolving upon him as county auditor, and when we consider, in addition to this the speculative feature of this entry, as shown by his knowledge of the fact that a town was to be built near the land, his race to Olympia, and his entry of this land from an inspection of the records of the local office, though he preferred another tract because it lay near to the proposed town, coupled with the further fact that he waited until only a few days before he went into office before he made settlement, leads me to believe that he did not act in good faith, but proposed to make entry with the intent to secure a homestead, without being put to the personal inconvenience of keeping up a continuous residence, by reason of his office. It will be borne in mind that his wife did not go upon the land, and whilst none of these several facts in themselves would be sufficient to indicate a lack of lawful intention upon the part of the defendant, nevertheless when they are considered altogether, they make an unbroken chain which leads one to the conclusion that the settlement was not made in good faith, and that the entry was, from its incipiency, speculative.

It thus follows that the decision appealed from was in error, and the same is hereby reversed, and the entry of Jones will be canceled.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

MINERAL LAND—PHOSPHATE—HOMESTEAD.

GARY v. TODD.

Land chiefly valuable for phosphate deposits is mineral in character.

A homestead entry, made with the knowledge that the land embraced therein contains a valuable deposit of phosphates, is illegal, and must be canceled.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (R. W.)

On September 18, 1889, Clarence C. Todd made homestead entry (No. 19,502) of lot No. 3, and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 11, T. 18 S., R. 19 E., at Gainesville, Florida.

On May 29, 1890, Thomas R. Carey filed an affidavit of contest against said entry, alleging "that said lands are chiefly valuable for mineral deposits, to wit: for valuable deposits of phosphate of lime." Said affidavit was on August 16, 1890, duly corroborated, when evidence was also furnished that the "Amidor mine" had been located, embracing said land.

A hearing was ordered for October 1, 1890, upon said allegations, when the parties appeared; and then and at several dates thereafter, submitted testimony. The local officers found that Todd's entry should be canceled. Todd appealed, whereupon by decision dated April 2, 1892, your office reversed the ruling below and dismissed Gary's contest. From this judgment Gary appeals here.

Todd went on the land some time in November, 1889, made some clearing and by March 1, 1890, he had a house completed in which he has since resided. The tract in question is worth \$100 an acre for its phosphate and is second class pine land, worth \$5 an acre for agricultural purposes, and the evidence shows that at the time of his said settlement Todd knew the existence of phosphate on the claim.

The out-cropping of phosphate rock thereon is in plain view from the public road, which runs through it. Several witnesses testified that they knew of the existence of phosphate on the land in August, 1889. Todd told W. J. Abston, about a week after he made his entry, that the land was "covered with phosphate," and offered to sell to him for \$1000. He also told P. J. Peachey, whom he met on his way home from making his entry at Gainesville, that there was phosphate rock on the land, and offered to sell to him for \$3000, and afterwards refused that price. At the time the entry was made it began to be known that this and other land in Citrus county was phosphate land. An eighty-acre tract in an adjoining section had been sold for \$15,000, on account of its phosphate and before November, 1889, there was a good deal of excitement in that county on account of the phosphate discoveries.

Todd, being thus aware of the phosphate on the land, his entry does not come within the purview of the act approved October 1, 1890 (26

Stat., 663) entitled "An act for the protection of actual settlers who have made homesteads or pre-emption entries upon the public lands of the United States in the State of Florida upon which deposits of phosphate have been discovered since such entries were made."

This act reads as follows:

That any person who has in good faith entered upon any lands of the United States in the State of Florida, subject at the date of said entry to homestead or pre-emption entry, and has actually occupied and improved the same for the purpose of making his or her home thereon, under the homestead or pre-emption laws, prior to the first day of April, anno domini, 1890, shall have the right, upon complying with the further requirements of the law, in other respects, to complete such homestead or pre-emption entry, and receive a patent for the lands so entered, occupied and improved, notwithstanding any discovery of phosphate deposits upon or under the surface of any of said lands after such entry was made: *Provided*, That the entryman had no knowledge of the existence of such phosphate deposits upon the land which is the subject of such entry at the date when the settlement thereon was made.

The validity of Todd's entry must accordingly be determined by the provisions of the homestead law, which prohibits "entry and settlement" of mineral land. The entry in question is an *original* homestead entry, consequently the case at bar differs from that of *Harnish v. Wallace*, 13 L. D., 108, cited in the decision appealed from wherein it was held that in order to defeat a *final* entry, it must be shown that mineral was known to exist at the time of such entry.

Prior to the initiation of Gary's contest, Todd had not submitted proof nor had final certificate been issued upon his entry. The mineral character of the tract, (and land chiefly valuable for phosphate deposits is undoubtedly mineral) is as we have seen, established by the evidence.

It follows that Todd can not be permitted to pursue his entry. For an original homestead entry is not such an entry as can be properly called a sale until it has been completed in accordance with law, and before the issue of final certificate is open to attack on the ground that the land embraced therein is mineral in character. *Jones v. Driver* (15 L. D., 514); *Dickinson v. Capen*, on review, (14 L. D. 426).

Your judgment dismissing Gary's contest is reversed and Todd's entry will be canceled.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

WAGON ROAD GRANT—INDIAN LANDS.

OREGON CENTRAL MILITARY ROAD.

Lands embraced within the terms of the grant to this company, and covered by the right of Indian occupancy at the date thereof, are not excepted thereby from the operation of the grant, but pass thereunder subject to such right; and the certification of such lands, after the extinguishment of the Indian right of occupancy, is duly authorized.

Lands found within the limits of a technical Indian reservation, at the date when the grant to this road becomes operative, are excepted from said grant; and proceedings should be instituted for the recovery of title where lands occupying such status have been certified or patented under said grant.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (P. J. C.)

On July 17, 1886, a letter was transmitted from your office to the Secretary of the Interior, with accompanying documents, relating to certain lands lying in the Lakeview, Oregon, land district, which had been theretofore certified to the governor of that State, or patented to the Oregon Central Military Road Company, with the recommendation "that the Attorney-General be requested to institute proper proceedings to recover whatever title may have been conveyed by such patent or certification to the land described."

It appears that on July 2, 1864 (13 Stat., 355), "to aid in the construction of a military wagon road from Eugene city by way of the middle fork of the Willamette river and the most feasible pass in the Cascade range of mountains, near Diamond Peak, to the eastern boundary of the State," Congress granted to the State of Oregon alternate sections of public land, designated by odd numbers, for three sections in width on each side of said road: all lands theretofore "reserved to the United States by act of Congress, or other competent authority," being excluded from the operation of said act, except so far as to grant the right of way through them.

The act contained no provision for indemnity lands; nor for filing maps of general or definite routes, and withdrawal thereunder; nor for issue of patents. But authorized the said lands to be disposed of by the legislature of the State for the designated purpose; and the sale of thirty sections; and upon the certificate of the governor that ten continuous miles of said road had been completed, other thirty sections could be sold; and so on until the entire road was completed, which was to be accomplished in five years.

On October 24, 1866, the legislature of the State conferred the grant upon the Oregon Central Military Road Company.

By act of December 26, 1866 (14 Stat., 239), a grant of indemnity lands was made, to be selected from the odd numbered sections "not reserved or otherwise appropriated," within six miles on each side of the road.

By act of March 3, 1869 (15 Stat., 338), the time for the completion of the road was extended to July 2, 1872.

By act of June 18, 1874 (18 Stat., 80), patents were to be issued for said lands, when it was shown by the certificate of the governor of the State that the road had been constructed and completed.

On July 27, 1866, the governor certified that the first fifty miles from Eugene City eastward were completed. On November 26, 1867, he certified that forty-two miles further were completed; and on January 12, 1870, he certified that a map of the entire line of said road had been filed in his office and that said road was fully completed.

It is not stated in said letter whether any map of said road was filed in your office, or whether any withdrawal for the same was made. The records of your office seem to be somewhat in confusion in this respect, but from a careful examination of them it appears that a map of said road was filed therein March 17, 1869, and withdrawal made of the lands within the granted limits only from Eugene City eastward to Warner Lake, May 18, 1870, which withdrawal was received at the local office May 30, 1870. This seems to be the first withdrawal; and it probably was made on the map transmitted to you by the governor, in his letter of January 12, 1870, with his certificate of the final completion of the entire road.

By act of Congress, approved March 25, 1864 (13 Stat., 37), the President was "authorized to conclude a treaty with the Klamath, Modoc and Snake Indians in South Eastern Oregon, for the purchase of the country occupied by them," and the sum of \$20,000 was appropriated for the purpose of carrying out the provisions of said act.

In pursuance of the provisions of this act, on October 14, 1864, a treaty was concluded between the United States and said Indians; was sent to the Senate, and on July 2, 1866, after two verbal amendments, ratified by that body; as amended it was approved by the Indians December 10, 1869, and proclaimed by the President on February 17, 1870 (16 Stat., 707).

By this treaty the Indians ceded to the United States "all their right, title and claim to all the country claimed by them" within designated boundaries; provided a described tract, within the country ceded, should be set apart and held as a reservation for them; and they agreed, upon the ratification of the treaty, to remove upon said reservation and remain there; they were to have exclusive use of the same, save that the right of way for public roads and railroads was reserved.

The route prescribed in the act of Congress from Eugene City, along the Willamette valley to a pass in the Cascade mountains near Diamond Peak, brought the wagon road to the western line of the lands claimed by the Indians. To continue the road to the eastern boundary of the State necessarily carried it through the Indian country; and the company following the valleys, as probably the most feasible route,

located the line of the road so that it traversed diagonally the Indian country, and for some sixty miles or more this reservation; and within its six miles granted and indemnity limits embraced more than one-half of the land upon said reservation fit for grazing or cultivation.

It appears that when this matter was received at the Department it was thought advisable, on suggestion of counsel, to hold it up pending contemplated legislation, whereby the questions presented might be fully determined. Accordingly, the matter has rested in abeyance, but, inasmuch as the subsequent legislation and litigation have not, in my opinion, settled the questions suggested by said letter, it is deemed expedient to take up the matter and have it finally disposed of.

Under the act of March 2, 1889 (25 Stat., 850), providing "for the forfeiture of wagon-road grants in the State of Oregon," the Attorney-General of the United States caused an action to be instituted for the purpose of forfeiting the particular grant under consideration, which was finally decided adversely to the government upon the issues presented (*United States v. California and Oregon Land Company*, 148 U. S., 31). But, for the reasons given in the recent case of *The Dalles Military Road Company* (17 L. D., 432), which I deem unnecessary to repeat here, I do not think the issue suggested by the letter of your predecessor was involved in or decided by the supreme court in that case.

It is stated in said letter that on April 21, and December 8, 1871, lands were certified to the State on account of the road grant, in the three and six miles limits thereof, and within the Indian country, outside of, and also inside of, said reservation; and that on July 10, 1883, lands similarly situated, in the three miles limits, were patented to the Road Company. It is in relation to lands within the Indian country, but outside of said reservation, as well as to lands within said reservation, that the recommendation is made.

As to the lands in "the Indian country" outside of the reservation, I can not concur in the recommendation. I do not think there can be any doubt as to the right of the road to these lands. The present case, in this respect, is very much like that of *Buttz v. Northern Pacific Railroad*, 119 U. S., 55. There, as here, at the time of the passage of the granting act to the road, the Indian title was not extinguished to the lands through which the road would necessarily pass. But as the court say:

That fact did not prevent the grant from Congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy, a right to use the land subject to the dominion and control of the government. The grant conveyed the fee subject to this right of occupancy. The railroad company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined, except by the United States. No private individual could invade it, and the manner, time, and conditions of its extinguishment were matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals.

It results, then, that the fee in said lands passed under the grant, subject to the Indian right of occupancy. This right as to the lands outside of the reservation was extinguished at the latest on February 17, 1870, when the treaty was proclaimed and the right of the grantee to the lands in question at once became complete, unless it had selected other lands in lieu of them. This does not appear. On the contrary, these lands were claimed, certified to the State, or patented to the company.

No question arises here as to the attachment of the grant at the time of the definite location of said road. In fact, in contemplation of law said road was not definitely located prior to the filing of the governor's certificate of its completion and the accompanying plat, January 12, 1870, following which a withdrawal in granted limits was made May 30, 1870, when the granted lands for the first time became identified. (*Rees v. Central Pacific R. R. Co.*, 5 L. D., 63.) The granting act provided that the grantee shall receive its lands as the completion of the road is certified, and, of course, its lists filed, examined and approved; and the act of June 18, 1874 (*supra*), authorizes the issue of patents, when the road is shown by certificate of the governor to be completed, as fast as the lands may "be selected and certified." None of the lands were certified prior to April 21, 1871, which is a year after the Indian title was extinguished as to the lands outside of the reservation. For these reasons, I must decline to concur in the recommendation of your predecessor as to said lands.

As to the lands within said reservation, which it is stated have likewise been certified to the State and patented to the company, a different state of facts exists. The same treaty which extinguished the Indian title of occupancy, to the outlying lands, and gave to the road, at the time of its completion, an unincumbered right and title to the same, expressly reserved and preserved the Indian right of occupancy in and to the land in the declared reservation. In other words, as to those lands the Indian right of occupancy has not been extinguished and was not intended to be extinguished; and as to those lands the company took title under its grant for the right of way only. This right of the Indians the court declares, in the extract made before from its opinion, can not "be interfered with or determined, except by the United States." The United States has not interfered with it and does not at present propose to interfere with it. Nor will it allow private individuals to interfere with it, as would be the case if the action in certifying and patenting said lands were permitted to stand.

As an incident in the case, it is to be noted that the grant to this road was at first for three sections in width on each side. This grant was accepted by the State and the company. After the treaty with the Indians had been made, whereby they declined to relinquish title to the whole country, claimed by them, and the government had pledged its faith to reserve the described tract for their sole occupation and

use, free from the intrusion of white men; and six months after the Senate had approved and ratified said treaty, Congress passed the act granting indemnity for lands that might be lost in the construction of the road. It is a fair inference that this indemnity grant was made to protect the company from loss, because the Indians declined to relinquish the whole of their land.

In view of all the facts, I think the recommendation as to the lands lying within the reservation a proper one, and as, at present advised approve it. You will therefore notify the Oregon Central Wagon-road Company to show cause, within thirty days after service of the notice, why proceedings shall not be taken in accordance with the act of March 3, 1887 (24 Stat., 556), to secure the restoration of said lands. After the expiration of the time fixed in such notice, you will then certify up such lists and with them any showing made by the company, with your opinion thereon.

Approved:

JOHN I. HALL,

Assistant Attorney General.

PRIVATE CLAIM—SPANISH GRANT—LEAGUE SQUARE.

TERESA RODRIGUEZ.

The term "league square" as used in the act of May 23, 1828, confirming certain Spanish private claims in West Florida and East Florida, contemplates the same area described by such term in the prior acts confirmatory of Spanish grants in West Florida and Louisiana, and means 6002.50 acres.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (J. I. P.)

On April 3, 1890, your office rendered a decision, in the matter of the above entitled claim, declining to issue a patent thereon, for the reason, as stated, that the same had never been confirmed. An appeal by the heirs of Teresa Rodriguez brings the matter to this Department.

The lands within the limits of this grant have been surveyed in Twp. 19 S., Rs. 28 and 29 E., in Florida. The claim was presented to the board of land commissioners in Florida for 5500 acres, and contains, according to said survey, 5426.82 acres.

Briefly stated, the history of this grant is as follows:

On October 18, 1815, one Miguel Marcos, first sergeant and sub-lieutenant by brevet of the First Corps, Royal Artillery, detached to the city of St. Augustine, petitioned Estrado, the then Spanish Governor of Florida, to grant him "in absolute property" 5500 acres of land, which was vacant, on the two banks of a creek, which comes from the west and discharges itself into the river St. John, about two miles to the north of a lake known as "Long Lake," and the mouth of said creek, called "Big Spring."

The petition was based on the military and public services of the petitioner, especially during the rebellion of 1812, and the further ground that he was married and charged with children.

On the same day the petition was presented, viz: October 18, 1815, Estrado issued the following decree with reference thereto:

Let there be granted to the interested, on the terms which he solicits, the lands indicated in this memorial, in virtue of the several royal orders, which authorize to that effect; and that he may be able to prove this concession in any event, let the necessary certificate be delivered to him from the Secretary's office.

(Signed)

ESTRADO.

On December 1, 1823, Teresa Rodriguez, widow of the petitioner and grantee, presented said claim to the board of land commissioners created by law to ascertain claims and titles to land in Florida.

On December 16, 1825, said board rendered the following decree:

The board having ascertained that the foregoing is a valid concession for the 5,500 acres of land made to Miguel Marcos, do therefore recommend it to Congress for confirmation,

and said claim was on the same day reported to Congress for confirmation.

All of the proceedings herein referred to are found at page 471, of Vol. 4, of Green's American State Papers. In the petition for confirmation of said claim, filed before the board of land commissioners, by the widow of Marcos, it was stated that the claim had never been surveyed. No survey was, in fact, made until 1850, when the number of acres contained therein was shown to be as above stated.

The matter was brought to the attention of your office by the urgent insistence of the widow and heirs of Marcos, for the issuance of patent on said grant, which resulted in your office decision of April 3, 1890.

It was urged before your office by the grant claimants, that said grant was confirmed by the first section of the act of May 23, 1828 (4 Stat., 284), the argument being that the grant contains a less quantity than a "league square."

The construction placed on said first section by your office is, that the league therein mentioned must be understood to mean a Spanish league, and that a league square by that measurement would contain 4,438.68 English acres; that as this claim had been surveyed so as to include 5,426.82 acres, which was in excess of a Spanish league by 988.14 acres, it did not come within the confirmatory provisions of section one of the act of May 23, 1828, *supra*.

The provisions of that section are as follows—

That the three claims to land in the district of West Florida, contained in the report of the Commissioners, and numbered four (4), eight (8), and ten (10), excluding from the latter the land contained in certificate, and in the plats A. and C., and the claims contained in the reports of the commissioners of East Florida, and in the reports of the receiver and register, acting as such, made in pursuance of the several acts of Congress providing for the settlement of private land claims in Florida, and recommended for confirmation by said commissioners, and by the register and

receiver, be, and the same are hereby, confirmed to the extent of the quantity contained in one league square, to be located by the claimants, or their agents, within the limits of such claims or surveys filed, as aforesaid, before the said commissioners, or receiver and register, which location shall be made within the bounds of the original grant, in quantities of not less than one section, and to be bounded by sectional lines.

In connection with the section quoted, should be considered the second section, which provides as follows—

That no more than the quantity of acres contained in a league square, shall be confirmed within the bounds of any grant; and no confirmation shall be effectual until all the parties in interest, under the original grant, shall file with the register and receiver of the district where the grant may be situated, a full and final release of all claim to the residue contained in the grant; and where there shall be any minors incapable of acting within said territory of Florida, a relinquishment by the legal guardian shall be sufficient; and thereafter the excess in said grants, respectively shall be liable to be sold as other public lands of the United States.

The question involved turns very largely upon the construction of the sections quoted, with reference to the meaning of the expression a "league square."

Another question which presents itself, and which for convenience is here stated, is, that the sixth section of the act of May 23, 1828, *supra*, provides that all claims to land within the territory of Florida, for a greater amount than that confirmed by the sections quoted, shall, on the petition of the claimant, be received and adjudicated by the judge of the supreme court of the district in which the land lies. And section 12 of said act provides, that any such claim not brought before said court by the claimant within one year from the passage of said act, and if so brought, shall not be finally disposed of, on account of the delay of the claimant, within two years, shall be forever barred, both at law and in equity, and no other proceeding, either at law or in equity, shall ever be sustained thereafter in any court whatever. Hence, it would appear that if this grant does not come within the confirmatory provisions of sections one and two of said act, and no proceedings have been instituted under section six of said act (which evidently have not been done) it is forever barred by the provisions of section twelve. (Jesse Fish, 16 L. D., 550.)

What did Congress mean by the expression, "a league square," in the sections quoted, for it is only by ascertaining the legislative intent that the correct interpretation of that expression can be reached.

A careful and diligent search through the supreme court decisions with reference to Florida and Louisiana private land grants, has failed to reveal any decision of that tribunal on the question involved. It appears to be a new question for judicial investigation, and hence not only of unusual interest, but of unusual importance as well.

It is proper to remark in passing that the act in question is not one that confirms, or attempts to confirm, any grant or grants as made; were it such, the area of those grants would have to be determined by the same measurement used by the government making them.

This proposition is too well established to require a reference to authority in support of it.

This act therefore is independent and original legislation by Congress, with reference to the private grants therein mentioned, not because of any treaty obligations or in compliance therewith, but manifestly for the purpose of quieting the disturbed conditions then existing in Florida with reference to unsettled and unconfirmed private claims. Without reference to the quantity of land originally contained in said grant as made, Congress seeks to confirm all those mentioned in the act to the extent of a "league square," and no more, and in determining what that extent is, the rule mentioned as obtaining in the confirmation of grants as made, does not of necessity control.

One of the rules laid down by Sutherland for the construction of statutes is as follows—

Primarily—that is, in the absence of anything in the context to the contrary—common or popular words are to be understood in a popular sense; and technical words, pertaining to any science, art or trade, in a technical sense. If the words of the statutes are of themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. They should be construed with reference to their generally accepted meaning at the time of the passage of the act, and if re-enacted, will be deemed to be adopted in their original sense. (Sutherland on Stat. Const., Sec. 247.)

Again—

Words in common use and not technically employed, in a statute which is intended to be understood and practiced upon by the people, should be construed according to their popular meaning; that such was the intention of the legislature is the only intendment that ought to be adopted. (Id., Sec. 251.)

The word "league" used by Congress in the act has a well known English and American meaning. Webster defines it as follows—"A measure of length or distance equal in England and the United States to three geographical miles; used chiefly at sea."

It is defined in the Century Dictionary as—"An itinerary unit not now in English use except as a marine league."

Worcester says of it that—"It is a measure of distance used chiefly in reckoning distances by sea, being three geographical miles, or about 3.45 English or statute miles."

It is evident, therefore, that the word "league" in the English and American sense, is a technical word, pertaining to the science of navigation and nautical measurements, and under the rule above quoted must be understood and applied in that sense. So applying it, the conclusion cannot be escaped that Congress did not use the word "league" in the English and American sense; otherwise, it would be in the attitude of directing the ascertainment of land areas by nautical measurement. Hence we must look further to ascertain the legislative intent.

Another rule for the construction of statutes, applicable to the one under discussion, is stated by Sutherland as follows—

In order to ascertain the purpose or intention, if it is not clearly expressed in a statute, or that such purpose or intention will be carried into effect, the court will

take notice of the history of its times when it was enacted. It is needful in the construction of all instruments to read them in view of all the surrounding facts. To understand their purport and intended application, one should as far as possible, be placed in a situation to see the subject from the maker's standpoint, and study his language with that outlook. Statutes are no exception. Sutherland on Stat. Const., Sec. 300.)

This rule is cited by the supreme court in the case of the United States *v.* Union Pacific Railroad Company, 91 U. S., 72, the court saying, with reference to the construction of statutes, that "courts may with propriety recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of particular provisions in it."

Again, the principle is laid down in the case of the United States *v.* Freeman, 3 How., 556, that "statutes relating to the same person or thing, or the same class of persons or things, should be taken into consideration in construing a law." Applying these principles, it will be remembered with reference to the history of the times when the act under consideration was passed that Congress at that time and for a quarter of a century prior thereto had been engaged in the adjustment of private land claims in the Territory of Louisiana acquired by the treaty of April 30, 1803, from France. From 1762 to October 1, 1800, that vast territory was owned by Spain, and a vast majority of the private land grants that under the treaty of April 30, *supra*, were to be protected by the United States, were Spanish grants. It is also a well known historical fact that, with the exception of the period between 1736 and 1783, when it belonged to England, Florida from 1536 to 1819, when it was purchased by the United States, was a Spanish possession. From 1783 to 1800 then both Florida and Louisiana belonged to Spain. From 1762 to 1800, a period of thirty-eight years, all the grants made in Louisiana were Spanish grants, and from 1783 to 1819, a period of thirty-six years, all the grants made in Florida were Spanish grants. Now it appears that in disposing of the public domain in Louisiana the Spanish authorities were governed by a statute or ordinance, known as the "regulations of O'Reilly," the eighth article of which provided that no grant, in certain localities, should exceed one league square. (Chouteau's Heirs *v.* United States, 9 Peters, 147; White's New Recopilacion, Vol. 2, p. 228-231.) This seems to be the beginning of the practice of limiting grants to a "league square" in the Spanish possessions of America. The act of March 3, 1807 (2 Stat., 440), section four, provides for the examination by the commissioners appointed for that purpose of claims to tracts "not exceeding the quantity of acres contained in a league square."

The confirmatory act of April 12, 1814 (3 Stat., 122), of April 29, 1816 (3 Stat., 328), and of February 5, 1825 (4 Stat., 81), all declare that no person shall be entitled to more than a "league square." True, this legislation was concerning grants in Louisiana, but they were Spanish grants, of the "same class" as those confirmed by the act under dis-

cussion. Many of them were made at a time when both Louisiana and Florida were Spanish possession, and in the absence of any definite information it would be reasonable to presume that a uniform system prevailed in provinces contiguous to each other. It was known when this act was passed that a tract of land in Louisiana a league square contained 6002.50 acres, determined by the French unit of measurement, the "arpén" (James and Dennis Quinnilt, 1 L. D., 275). See also testimony of Walker Gilbert, Maxfield Ludlow, Mr. Griggs *et al.*, in the claim of Gabriel Winter *et al.*, American State Papers, pages 260 and 261.

The case of John Doe on Demise of Florentio Cummysns *et al.*, v. W. K. Latimer *et al.*, 2 Fla. Reps., 71, was the case of a grant in West Florida, petitioned and allowed for 800 arpents of land, while a Spanish province, and it incidentally appears that other grants had been made in that province for 3500 and 7000 arpents.

White's New Recopilacion, Vol. 2, p. 376, shows that the grants of the public domain in West Florida from 1801 to 1805 amounted to 99,884 arpents, 98 perches.

Same authority, p. 378, refers to a grant of land, in East Florida, of 289,645 $\frac{1}{2}$ English acres, which, says the surveyor of the province who makes the report, amounts to 342,250 $\frac{1}{2}$ arpents.

These references are made for the purpose of showing beyond all question or cavil, that in the Spanish possessions of Louisiana and West Florida the French arpent (or arpén), and not the Spanish "vara" controlled in the measurement of lands.

In dealing with the Spanish grants in Louisiana Congress knew that a league square meant 6002.50 acres, and when it came to dealing with Spanish grants in West Florida, it knew that the same rule obtained; hence, with its knowledge of the popular and general understanding of the meaning of the term, in the once Spanish province in that section, there is no reason to believe that it intended a league square to mean any less quantity of land in East Florida than it did in Louisiana and West Florida, or that a Spanish grant of a league square in one province should have any advantage over a similar grant in the other. Had such been the intent, it would certainly have been expressed in the language of the acts. As it is, the confirmatory acts with reference to grants in Louisiana and Florida are substantially identical in language, and it will be kept in mind that they are of the same class.

In the particular act under discussion, it will be observed that certain grants in West Florida and those in East Florida are confirmed to the "extent of the quantity of a league square;" no distinction is made between the two divisions; the same quantity is confirmed in each.

Now, there is no question but that a "league square" in West Florida contained 6002.50 acres of land, and that Congress knew it when it passed the act in question, and if it had intended it to have any other or different meaning with reference to East Florida, it would have so stated in the act.

It would indeed be a singular construction, that would give to the expression a "league square" in the act under consideration one meaning in West Florida, and another in East Florida, in the absence of any expression to that effect in the context of the act.

The decision of your office that this question must be determined on the basis of the Spanish unit of measurement known as the "vara" cannot to my mind be sustained by the facts in the case. The vara as a unit of measurement does not appear to have been considered by or known to Congress in its dealing with Spanish land grants until after the acquisition of California and New Mexico, which was twenty years after the passage of the act under discussion; hence Congress could not have intended to use the vara or any other Spanish measurement because it had no knowledge of such measurement when this act was passed, and because that measurement had not been used by Spain herself in her Floridian provinces. But there is another weakness in that argument. It seems to have been the policy of Spain to adopt the unit of agrarian measurement used by the sovereignty that preceded her, and on her acquisition of East Florida she adopted the English unit of measurement.

White's New Recopilacion, Vol. 2, p. 261, sets forth a letter from Estrado, the Spanish Governor of East Florida, to the Captain General of the Spanish provinces, dated July 29, 1811, in which he speaks of a certain grant that had been petitioned for, saying that "it would comprise 6,500,000 acres, English Statute measurement, which is usual in this province."

In conformity to that rule, this grant was petitioned and allowed for 5,500 acres.

The conclusion, however, that a *Spanish league* was meant, is at variance with and repugnant to every fact and circumstance in the history of Spanish grants in the provinces mentioned, and in the legislation of Congress in relation thereto. Indeed, the authorities are conclusive on the question that in neither Louisiana nor the Floridas was the Spanish unit of measurement used. And it seems that when it was desired to reduce the acres mentioned in the East Florida grants to a more familiar unit of measurement, they were reduced to "arpens." (See White's New Recopilacion, Vol. 2, p. 378, above cited.)

In view of the facts herein presented, I am unable to escape the conviction that in passing the act of May 23, 1828, *supra*, Congress intended to deal with Spanish land grants in East Florida as it had with those in Louisiana and West Florida, and to confirm to the grantee in the former territory the same quantity of land it had confirmed to those in the latter; that a "league square" of land as understood by Congress, as well as by all those concerned, in reference to private claims, in either of those territories, at that time, meant a tract of land containing 6002.50 acres; that such was the generally understood meaning of that term; and that if Congress had intended the expres-

sion used in the act of May 23, 1828, *supra*, to have any special or different meaning, with reference to East Florida, it would have so expressed it in said act.

If, however, it should be contended the word "league" used in the act under discussion meant an "English league" of 3.45 English Statute miles, then a "league square" would contain 11.9 square miles, or 7516 acres, which is more than the number of acres contained in the claim here involved.

It follows, therefore, that this claim in question, containing, as shown by the survey, 5,426.82 acres, is less than a league square, and is confirmed by the first section of the act of May 23, 1828, *supra*.

Your office decision rejecting said claim, because not confirmed, is therefore reversed, and you are directed to patent said claim in accordance with the survey thereof.

Approved:

JOHN I. HALL,

Assistant Attorney General.

TIMBER CULTURE ENTRY—COMMUTATION.

FRANK E. WRIGHT (ON REVIEW).

The heir of a timber culture entryman cannot commute the entry of the decedent under section 1, act of March 3, 1891, if not a resident of the State in which the land is situated.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (W. F. M.)

I have received your office letter of June 19, 1893, transmitting a motion for review of departmental decision, dated March 25, 1893, rendered in the ex-parte case of Frank E. Wright, administrator of the estate of Frank C. Russell, deceased, and reported in 16 L. D., 322. In that decision it was held that the heir of Frank C. Russell, being a non-resident of the State of Montana, where the land in question is situated, could not be permitted to make commutation entry as authorized under the first section of the act of March 3, 1891.

The ground of the motion is that this "ruling is not good law," and is not in accord with the spirit of the land laws, and of the rulings of this Department in analogous cases."

The letter of the statute lays down in plain and unambiguous terms the conditions upon which the right of commutation may be exercised, and among these is actual and *bona fide* residence within the State or Territory in which the land is located.

While it is the general policy of the Department to recognize the rights acquired by deceased entrymen, regardless of the character of the entry, and to transmit them to the heirs, in cases where the latter

are capable of taking under the laws regulating the public lands, it is to be observed that the right of commutation sought to be exercised, is not the only and ultimate right of the heir. Under the liberal policy of our laws, the fruits of the industry of the entryman are preserved to his heirs by guaranteeing to them the privilege to take up the work where it was interrupted by the death of the former, and to make the final proof and receive certificate and patent, in all respects as he could have done. It will be seen, therefore, that the heir, in the present case, may receive the full benefit of the law under which the entry was made.

I find no error in the decision under review, and the motion is therefore denied.

Approved:

JOHN I. HALL,

Assistant Attorney General.

PRACTICE—MOTION FOR REHEARING.

LUJAN *v.* CORDOBA.

A motion for rehearing on the ground of newly discovered evidence can not be allowed on the unsupported affidavit of the applicant.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (E. M. R.)

The record shows that on February 17, 1888, Lujan filed his pre-emption declaratory statement for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 29, T. 9 S., R. 16 E., Roswell land district, New Mexico, and on March 23, 1888, Francisco Cordoba filed declaratory statement for the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of the same section, thus bringing the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ in controversy.

At the trial before the local officers, a decision was rendered in favor of Lujan.

Upon appeal to your office, the decision of the register and receiver was reversed, and Lujan appealed to this Department, where, on November 22, 1892, Secretary Noble reversed the finding of your office, and directed the cancellation of the filing of Cordoba.

January 24, 1893, Cordoba was notified of this decision, and on February 14, 1893, he filed a motion for rehearing upon the following grounds:—

First. The true merits of this case have not been submitted by reason of the absence of facts which, had they been introduced at the time of the taking of evidence in this cause, would have given a different complexion to the case.

Second. At the time of taking the evidence the defendant Cordoba made an honest mistake by being persuaded and misled into employing counsel to conduct his cause who was (without the knowledge of this defendant at the time of trial) demented and insane, and who since that time has died from the effects of such insanity, and

in consequence of such insanity said counsel against the will of this defendant, went to trial without the attendance of two absent material witnesses Jesus Mars and Manuel Moraga who would have testified to facts not brought out at said trial which were vital to defendant's case.

Third. Since said trial was had, defendant has discovered new and material evidence not known or used at said trial in this, that on date of Lujan's filing, February 17th, 1888, the said pre-emptor Lujan was not a citizen of the United States, and had not declared his intention to become one, but instead was a citizen of Mexico.

Fourth. Since said trial was had, defendant has discovered further new and material evidence not known or used at said trial, in this, that previous to February 17th, 1888, the said Martiano Lujan had exhausted his pre-emption right by filing his pre-emption claim in the Las Cruces, New Mexico, land office for land situated in that district.

Fifth. Under the principles laid down by the Supreme Court of the U. S. in the case of *Atherton v. Fowler*, the Hon. Secretary's decision in this case is against law, in this, that the court says in substance in that case "that the pre-emption law gives no man the right to make entry upon and file for land possessed, claimed, and improved by another, that the law only gives the right of pre-emption to unimproved and unoccupied public land, that the law never intended to give one man the right to rob another of his labor and improvements," etc.

The record in this contest case shows without contradiction that Lujan made entry upon improved land with houses and other improvements situated thereon, the property of defendant Cordoba.

Wherefore the defendant prays that a rehearing and review in this case be granted.

GEO. B. BARBER,

Attorney for Deft., the petitioner herein.

LINCOLN, N. M.,

Feb. 3rd, 1893.

TERRITORY OF NEW MEXICO, } ss.
County of Lincoln.

Francisco Cardoba being sworn on his oath says that he is the defendant in the above entitled cause, and also the petitioner in this application for a rehearing and review, that he has had read over to him the matters and things set out in the foregoing motion, that if granted a rehearing he expects to prove the 2nd paragraph of such matters and things to be true, by Jesus Mars and Manuel Moraga who were absent out of the County of Lincoln and not obtainable at the time of trial of this case, that previous to said trial he used due diligence and made efforts to obtain the attendance of such witnesses, without avail, that said witnesses are now obtainable and are willing to testify in this case at any time it may be set down for hearing.

That he expects to prove the matters and things set out in the third paragraph in said motion, by a copy of the records of the 5th Judicial District Court of New Mexico, and by oral testimony.

That he expects to prove the matters and things set out in the fourth paragraph in said motion, by a copy of the records of the U. S. land office at Las Cruces, New Mexico, and by oral testimony, and that said matters and things mentioned in said third and fourth paragraphs of said motion were not known to him at the time of said trial, and have been discovered since said trial was had; affiant further swears that his motion in this case is made in good faith and not for the purpose of delay.

FRANCISCO CORDOBA.

Subscribed and sworn to before me this 3d day of February, A. D., 1893.

GEORGE SENA,

Probate Clerk.

Whilst these allegations would be sufficient to grant a new trial on, were they here in a proper manner, and supported by proper affidavits, in their present condition it is impossible for the Department to grant the motion prayed for, for the reason that, though the allegations in reference to the insanity of petitioner's attorney, or the allegation that Lujan had exhausted his pre-emption rights, would be sufficient to grant a rehearing, supported by the proper showing, still this Department can not establish the precedent of reopening a case, and putting the defendant to the cost and worry of a new trial, upon the unsupported affidavit of the opposing litigant. In *Holloway's Heirs v. Lewis* (13 L. D., 265), it was held that "Motions on the ground of newly discovered evidence should be supported by the affidavits of the witnesses who will testify to the alleged newly-discovered facts, or satisfactory reasons for their non-production should be given. *Hilliard on New Trials* Chap. 15, Secs. 35 and 37. *McKinnis v. State of Oregon* (11 L. D., 618)." This has not been done in the case at bar, and the motion consequently is fatally defective.

It is, therefore, held that in order to entitle one to a rehearing, upon the ground of newly-discovered evidence, even where the allegations themselves set forth sufficient grounds, and is sworn to by the petitioner, there must be in addition other evidence to support the statements of the petitioner.

The motion is therefore dismissed, and the original decision of this Department is hereby adhered to.

Approved:

JOHN I. HALL,

Assistant Attorney General.

TIMBER CUTTING—RAILROAD INDEMNITY LIMITS.

INSTRUCTIONS.

Permission to cut timber, under the act of March 3, 1891, on unsurveyed lands lying within the indemnity limits of a railroad grant, may be given, subject to the condition that such permit shall become inoperative as to any tract that may be thereafter duly selected by the company under its grant.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (F. W. C.)

I am in receipt of your office letter of December 1, 1893, in which it is stated that application has been made for permit to cut timber from unsurveyed lands within the indemnity limits of the grant for the Northern Pacific Railroad Company, under the act of March 3, 1891 (26 Stat., 1093), and in view of the directions given in departmental letter of February 3, 1892 (14 L. D., 126), a ruling is asked upon the authority to grant the permit in question.

In the matter under consideration in the communication of February 3, 1892 (*supra*), the land was situated within the primary limits of the grant, opposite which the road had been definitely located and constructed.

The company's right to the odd numbered sections within said limit had therefore attached, and as they had not been separated from the even sections remaining to the United States, by survey, it was directed that no permit be granted.

In the present case the land is within the indemnity limits.

The rights of the company in the granted and indemnity limits are widely different. All previous withdrawals made of indemnity lands on account of this grant were revoked by departmental order of August 15, 1887, and the lands not embraced in pending selections were ordered restored.

Within the indemnity limits it is held by this Department that the company has no right in the absence of due and specific selection made in the manner prescribed by the regulations.

It is further held that selections can not be made of unsurveyed lands; consequently, the company has no claim to the unsurveyed lands within its indemnity limits, and I can see no objection to granting the permit, if otherwise regular and proper, upon the condition that the same shall become inoperative as to any tract selected by the company under its grant, upon the presentation in due form of a proper list by the company, embracing any of the lands covered by the permit.

Approved:

JOHN I. HALL,

Assistant Attorney General.

PRACTICE—FEES—NOTICE OF CANCELLATION—APPLICATION.

CUNNINGHAM *v.* LONGLEY (ON REVIEW).

The fee allowed the register for giving the successful contestant notice of cancellation is a matter personal to said officer, and he alone has standing to complain of its non-payment.

An actual tender of the fees prescribed on the allowance of an entry, is not required of a successful contestant who applies to exercise his preferred right in the presence of an intervening adverse entry of record.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (W. F. M.)

The following recital contains the facts material for the consideration of the motion for review transmitted with your office letter of September 12, 1893.

On April 20, 1885, Mary E. Stokes made homestead entry of the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of

section 24, Township 22 N., range 2 E., of the land district of Marysville, California. Against this entry Albert Cunningham prosecuted a successful contest, the final decision of this Department being rendered on April 16, 1890, of which the local officers received notice on May 1, 1890.

On April 30, 1890, Alexander P. Longley filed in the local office the relinquishment of Mary E. Stokes, and at the same time he was permitted to make homestead entry of the land in controversy, subject, however, to the preference right of Cunningham.

On May 14, 1890, Cunningham appeared at the local office and demanded the exercise of his preference right, presenting the required application papers, and offering to pay all fees exacted. It appears that he made an actual tender of twenty-one dollars, that being the sum stated by the register to be necessary. The land, at this date, being covered by the entry of Longley, the register very properly refused to receive any sum whatever from Cunningham, or to allow his entry. It further appears that at this date he had not paid the fee of one dollar allowed by the law to the register for giving notice of the order or cancellation, but it was subsequently paid, on June 13, 1890.

On May 15, 1890, Longley was ruled to show cause why his entry should not be canceled and Cunningham allowed to exercise the preference right to which he was entitled, and it is the decision of this Department of that issue, rendered on June 10, 1893, and reported in 16 L. D., 514, that a review is now asked.

The grounds of the motion are quoted as follows:

1. It is not true that Cunningham appeared and paid the sum of one dollar for notice of his preference right before the citation was issued under which the present proceedings have taken place, and neither the government nor Longley have any reason to complain.

2. Error in the construction of the law of the case in holding that a tender of twenty-one dollars is sufficient for a tender of twenty-two dollars; that it was necessary for the register or receiver to regulate the amount of the tender, or that their action could in any way affect the rights of Longley subsequent to Longley's filing.

3. Error in recognizing the payment of the fee of one dollar, paid forty eight days after the issuance of the notice, forty nine days after Longley filed, and thirty four days after Cunningham had presented his application papers and had citation issued.

As a summary disposition of the first and third assignments of error, it is announced that this Department, in the absence of complaint by the register, will not enquire as to whether or not the fee allowed to him in such cases is paid. The proviso of the second section of the act of May 14, 1880, entitled him "to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported." While this Department will, in proper cases, exact its payment, neither the government nor the contestee has any interest therein. It is a matter personal to the register, and he alone has standing to complain of its non-payment.

The contention of the second assignment of error that a tender of twenty-one, instead of twenty-two dollars, is fatal to Cunningham's entry, is equally without merit. The law of tender, which in certain cases exacts the showing and offering of a sufficient sum of legal tender money, is controlled and modified by the common sense maxim that the "law does not require a vain thing." The incapacity of the local office to receive, a fact known to Cunningham, dispensed him from the duty of making actual tender. His application to make entry was simply a formal act designed to save the privilege accorded him by the law, and to give him standing to bring Longley before the officers in order that they might clear the land of the latter's improper entry.

The motion for review is denied.

Approved:

JOHN I. HALL,

Assistant Attorney General.

SOLDIERS' ADDITIONAL HOMESTEAD—ACT OF MARCH 3, 1893.

YELLOW DOG IMPROVEMENT CO.

The right to perfect title under the act of March 3, 1893, on payment of the government price of the land, may be accorded a transferee holding under a certified soldier's additional right located after the death of the soldier.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (P. J. C.)

I have considered the appeal of the Yellow Dog Improvement Company from your office decision of June 25, 1892, wherein soldier's additional homestead entry for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 17, T. 50 N., R. 27 W., Marquette, Michigan, land district, is held for cancellation.

It seems that on March 6, 1880, your office issued a certificate of right to make soldier's additional homestead entry to Joseph Clayton for one hundred and twenty acres, and on July 27, 1891, the certificate was located on the above described tract of land, apparently by him, as the certificate and receipts are issued in his name.

By affidavits filed in the local office, and transmitted to yours, June 13, 1892, it is shown that Joseph Clayton died in Taney county, Missouri, April 2, 1887. His wife and son swear that to their certain knowledge he had not at any time sold his additional right. Your office found that the evidence satisfactorily shows that Clayton died long before the entry was made, and held that the entry was illegal; and held it for cancellation, under the authority in the case of John M. Walker (10 L. D., 354). From this judgment the Improvement Company prosecutes this appeal, and has filed an affidavit in this Department, showing that through its agent it purchased the said certificate

in good faith, and for a valuable consideration; that it is owner and in possession of the said land. It also asks to be permitted to perfect title to the lands covered by this entry under the act of March 3, 1893 (27 Stat., 593).

This act provides:

That where soldier's additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for the land; but no person shall be permitted to acquire more than one hundred and sixty acres of public land through the location of any such certificate.

As this case comes within the purview of the act and the rule announced in *Charles Holt* (16 L. D., 294), and *Kisiah Goodnight* (Id., 319), your said office decision will be reversed, and the case returned to your office for appropriate action.

It is so ordered.

Approved:

JOHN I. HALL,

Assistant Attorney General.

PRACTICE—MOTION TO DISMISS.

BRADFORD *v.* ALESHIRE.

Where the local office sustains a motion to dismiss, filed by a defendant who submits no testimony, and such action of the local office is reversed on appeal, the case should be remanded for the further action of said office.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (P. J. C.)

On July 20, 1892, your office was directed to certify to the Department the record in the case of *Mrs. A. D. Bradford v. David Aleshire*, involving the timber-culture entry of the latter for the NE. $\frac{1}{4}$ of Sec. 9, T. 10 S., R. 1 E., New Orleans land district, Louisiana.

Mrs. Bradford filed contest affidavit against the entry on the first of July, 1891. Notice was by publication. The local officers directed that testimony should be taken, under Rule 35 of Practice, before a notary public at Crowley, Louisiana, on August 18, 1891—the testimony so taken to be returned to their office, “on or before August 22, 1891, at 12 o'clock, M.” The notice was first published on July 11, 1891, and a copy sent him on that day, at St. Paul, Nebraska, which was received by him on July 18, as shown by the registry return receipt; but he did not appear at the hearing. He alleges that he wrote to an attorney in Louisiana to represent him at the taking of testimony before the notary public on August 18, 1891, and before the register and receiver; but said attorney was temporarily absent from

the State, and did not receive the letter in time to enable him to do so. At a later date—to wit, October 2, 1891—said attorney appeared before the local officers (who had not yet rendered a decision in the case), and moved that the contest be dismissed, on the ground that Aleshire “had not received a due and legal notice of the alleged contest; also that the affidavit of contest was “defective, insufficient and illegal.” The local officers sustained the motion because the affidavit for publication of the notice of the hearing was not sworn to by the contestant, but by her attorney. On appeal, your office, sustained the action of the local officers. The case was brought, by *certiorari* before the Department, and the application for the writ was allowed. (15 L. D., 83.)

The case was then sent up, whereupon the Department reversed said judgment, and also held that “the evidence submitted clearly established the fact that the entryman has not complied with the requirements of the law under which his entry was made,” and ordered his entry canceled (15 L. D., 236).

A motion for review was filed; but the Department overruled the motion (L. and R., 262, p. 296).

Counsel for the defendant now files a petition for re-review of said decision for the reason, as alleged, that due consideration was not given to “the additional evidence filed.” This evidence referred to is an affidavit setting forth the reasons why the claimant did not appear at the trial.

I do not think the ground assigned sufficient in itself to warrant a re-review. This is a question which should, in my opinion, first be passed upon by the local officers, who are clothed with the power to decide whether or not a sufficient showing has been made to warrant them in allowing the defendant to offer testimony in support of his entry; it is a matter lodged in their discretion, subject to review by the appellate tribunal.

The case is, however, properly before me, by means of a practice recognized by the Department, and under the supervisory powers of the Secretary of the Interior over all matters pertaining to the disposal of the public lands, I take it that I may consider any question presented by the record, *sua sponte*, and correct any errors apparent in the former decision.

One of the grounds of error assigned in the motion for review was: (4) “contestee was entitled to make his defense on the merits in the local office after its action had been overruled.”

It will be borne in mind that the local officers had not passed upon the testimony taken before the notary, and before doing so, the defendant appeared and raised the question of jurisdiction of the local office to try the case. Without examining the testimony or passing upon the merits of the controversy, they sustained the motion and held that there had not been legal service upon the defendant. Your office affirmed this decision, but the Department overruled it, and then, for

the first time in the history of the case, the testimony was examined and held to be sufficient to warrant the cancellation of the entry. In my opinion this latter action was erroneous. The judgment demanded by the proceedings was one upon the motion to dismiss. When final action was taken upon this motion the case should then have been remanded to the local office for its further action.

The injustice of the course pursued is quite apparent, on reflection. When the motion to dismiss was sustained there was nothing further that the defendant could do (*Montgomery v. Pfeifer*, 6 L. D., 364). The decision was in his favor, and he could only await the further action of the contestant to begin proceedings anew, or appeal.

Suppose his motion had been denied; it cannot be said that that action would have exhausted his remedies. He had the privilege of asking leave to offer evidence in support of his entry, and the local office still having jurisdiction of the case would have been required to pass upon his demand. There may have been other defences, such as objections to the testimony, the manner in which it was taken, etc., all of which should have been first raised and decided before the local officers. (*Lein v. Botton*, 13 L. D., 40).

In the case of *Kelly v. Butler* (6 L. D., 682), the contestant offered his testimony, whereupon the defendant moved to dismiss the contest, because the evidence did not show a failure to comply with the law on the part of the entryman. The motion was sustained. On consideration of the case, you reversed the action of the local officers and held the entry for cancellation. Secretary Vilas said of this action—

There is manifest error in the decision appealed from. If the motion to dismiss had been overruled by the local officers the contestee would have had a right to offer evidence to rebut that submitted by the contestant, and he ought not to be denied this right because the decision of the local officer in his favor is held by your office to have been error. The practice heretofore has been to treat such a motion like one for a non-suit and not as a demurrer to the evidence.

The cases of *Kiser v. Keech et al.* (7 L. D., 25), and *Dixon v. Sutherland* (7 L. D., 312), cited as authority in the decision overruling the motion for review, and the later case of *Yarneau v. Graham* (16 L. D., 348) are not in conflict with the ruling of the case at bar. In *Kiser v. Keech*, all the parties had had an opportunity to present their cases, and the same were decided in regular order by the local officers and the Commissioner. The judgments were affirmed by the Department, and the question remaining to be decided was as to who of the litigants had the prior right to the land. The record before the Department was, presumably, sufficient to enable it to determine that point, and therefore it was held that "to avoid unnecessary circuitry of action and consequent delay, the Department might pass upon this question instead of returning the case for further action to your office."

In *Dixon v. Sutherland*, *supra*, after the contestant had offered his testimony, the defendant moved to dismiss the case upon the ground that she had not been properly served. This motion was overruled.

and judgment rendered on the evidence. The defendant elected to stand by her motion in preference to offering testimony. In deciding the case, the Department said—

The defendant has had full opportunity for presenting her defense, and having acted upon the erroneous advice of her counsel upon a purely technical ground, she must abide by the decision of the Department.

In the case of *Yarneau v. Graham*, *supra*, the defendant, on the day of the trial especially appeared and moved to dismiss before the case was called. His motion was overruled and the contestant offered his testimony. The defendant offered none, but insisted on his motion to dismiss, which was again overruled, and he “elected to stand on his special appearance.” Judgment was rendered on the testimony, and on appeal your decision affirming the action of the local officers was sustained by the Department. In deciding it, it was held that “she (the defendant) had had her day in court, but refused to offer any testimony, electing to rely upon another line of defense; and she must now be held to her election.”

It will be observed that these cases, and others on the same line, widely differ from the one at bar. In all of these cases the defendants had an opportunity to present their defense after the motion had been *overruled*, but refused to do so, and judgments were rendered on the evidence; whereas here, the motion to the jurisdiction was *sustained*, and the testimony was not considered until it reached the Department.

In my opinion the Department erred in passing upon the merits of the controversy, and the action it should have taken after overruling the motion to dismiss, was to have remanded the case to the local office, with instructions to proceed with the trial in regular order. The petition for re-review is therefore granted, and all the papers are herewith returned to be transmitted to the local officers, with instructions to proceed in accordance with this decision.

Approved:

JOHN I. HALL,

Assistant Attorney General.

MINING CLAIM—PLACER LOCATION—DISCOVERY.

FERRELL ET AL. *v.* HOGE ET AL.

There must be a discovery of mineral on each twenty acres in a placer location of one hundred and sixty acres made by an association; and such a location of that amount, based upon a single discovery, is void except as to the twenty acres immediately surrounding said discovery.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (P. J. C.)

The land involved in this appeal is mineral entry No. 209 on unsurveyed land (designated as Lot No. 40), made by Hoge *et al.* of the 14469—VOL 18—6

Horse Shoe Quarry Placer, January 6, 1890, at Helena, Montana, land district.

It appears by the record that William L. Hoge and seven others located upon unsurveyed land the Horse Shoe Quarry Placer Mine, April 9, 1889, and on January 6, 1890, made cash entry of the same. On February 12, 1891, E. O. Ferrell and seventeen others filed a protest against said entry, alleging that they are the lawful owners of twelve acres of said placer claim; that the applicants are not authorized to obtain patent for a large body of land as a placer claim which has no deposit of precious mineral, but valuable only, in a small portion thereof, as a stone quarry; that the claimants have not acted in good faith in that they are seeking to obtain title to land as a placer mine that has value only as building sites, owing to its contiguity to the town of Anaconda. With the protest affidavits were filed showing that the protestants had valuable improvements on part of the land and were residing thereon. By letter of September 2, 1891, your office ordered a hearing to decide—

(1) Whether the lands or any portion thereof embraced within said mining claim are valuable for the minerals contained therein, and if so, clearly to designate what portion.

(2) Whether the lands or any portion thereof were occupied for residence or for business purposes at the date of the placer location, and if so, to clearly designate what portion.

The hearing will be so directed that the value of the lands for all purposes, whether mineral or agricultural or municipal or as seats for towns will be shown.

A hearing was accordingly had, the testimony having been taken before a notary public at Anaconda, and as a result the local officers decided that it was incumbent on the placer claimants to show that valuable deposits exist on each ten acres, and that inasmuch as the fact was not shown the entry should be canceled except as to the ten acres surrounding one excavation in which lime stone had been disclosed. They also found that the land had but little value for agricultural purposes; that at the date of location of the placer there were four dwelling houses located in an enclosure of about ten acres on the northeast corner of the land. The claimants appealed, and by your office letter of September 9, 1892, the judgment below was reversed and the protest dismissed, whereupon the protestants prosecute this appeal, assigning as error, substantially, that your decision is against the law and the evidence.

The testimony in this case, in so far as it might be of value in determining the several points and objects on the plat offered in evidence, is entirely insufficient. I infer from the testimony that it was taken from a point where the witnesses could see the land, and in describing particular places upon it they would refer to it by pointing it out to the attorneys, and their discussion of the matter was taken down by the reporter. Again, when referring to the plat used in evidence, they are equally as unsatisfactory, and in the examination of it it is abso-

lutely impossible to ascertain often times to what the witnesses or the attorneys allude. The map used simply gives the exterior lines of the claim, and the Sioux Quarry placer, which the land in controversy surrounds on three sides; courses, distances and corners; three openings or excavations, and a line of railroad. Nothing else.

There is page after page of questions and answers of which the following are fair samples: "There is a lime kiln here as you go up Sheep gulch." When asked to describe it on the map, the witness says, "there is a lime kiln here." "Here is the gulch here and this is the western slope." "Down to about this point here," "a house built there;" "the excavations being there and the gulch running here." One of the attorneys in asking a question, says: "now looking at that, . . . considering the quarry here, . . . do you think this portion of the claim was valuable," etc. It will thus be seen that if it was material to locate any particular spot, aside from those mentioned, it would be impossible to do so. This sort of testimony is exceedingly unsatisfactory.

It seems that at the date of the placer location there were four or five houses or cabins near the northeast corner of the land. The north side of the placer at this point is the south line of the townsite of Anaconda, and along this line on the land in question, is a strip of comparatively level ground, said to be available for building sites, probably one thousand two hundred feet long and one hundred feet deep, running back to a hill that rises rather abruptly. It is upon this narrow strip at a point where a gulch opens out into a valley, that these houses have been built. This is all the land that can be used for townsite purposes; at least there is no claim made that any other portion of the tract has been, or is sought to be, made use of for that purpose. The remainder of the tract is rough and mountainous, apparently traversed by one or more gulches, and is practically of no value for agricultural purposes. At the date of the hearing there were about twenty-four dwelling houses on this strip, the area of which is estimated by protestants to be about ten acres, while claimant's witnesses place it at about two. There is testimony tending to show that when the townsite of Anaconda was surveyed this land was omitted because it was considered not desirable for residences.

These protestants are not seeking to obtain the land under the townsite act. Those of them who went upon the land after the location of the placer claim are certainly charged with notice of the fact of its location. They are simply trespassers as against the placer location.

So that if it can be determined that the land in question is valuable as a placer mining claim, the fact of the settlement on it by the protestants will not defeat the entry.

It will be conceded that the testimony shows that the claimants base their right to the ground upon the fact that it contains lime stone, slightly impregnated with iron, which is valuable for fluxing purposes in smelting the more precious ores, and for the sand stone for building

purposes it contains. In the location certificate, however, it is said, "the locators have discovered a deposit of lime and iron rock valuable for fluxing purposes within the limits of the claim." This location was made upon an excavation disclosing lime rock in the western part of the land. There are three of these excavations in close proximity, but as I understand the testimony, the one marked "No. 3" is the one that contains the lime stone, while the others show a sand stone formation. There is no claim on the part of the claimants that they made any other discovery, but, as I understand, they afterwards found in the northeast corner, where the houses are, one, or two, old excavations in which sand stone was also discovered. It is this particular excavation—"No. 3"—or discovery, that the register and receiver had reference to when they decided that "a valuable deposit being shown to exist at any point, the claimant may generally take the surrounding ten acres." Your office decision holds that this proposition—

is inapplicable to this case, because, the claim being situated on unsurveyed lands and being applied for and entered as "Lot No. 40," contains no ten-acre tracts. The claim as located is an *entirety*. See 7 L. D., 81.

It having been established that said lot No. 40, as an entirety, contains a valuable deposit of limestone, it follows that the entry of said tract must stand.

This ruling is really the basis of the appeal, and the elaborate arguments filed are almost entirely addressed to this proposition. The testimony of one of the locators as to the discovery and location ought to be conclusive on these points. He says he was on the ground when it was located. He was also asked, "Where was the discovery of that claim?" His answer was, "I am not positive; I think the notice was posted in this excavation." I take it that by "this excavation" he means "No. 3."

Q. Mr. Harper, what mineral was on this ten acres at the NW. corner that you discovered at that time?

A. Building rock.

Q. And on this thirty acres immediately south?

A. A large showing of lime (in excavation No. 1, also a showing of iron in this deposit here).

Q. What other?

A. Besides the lime and iron there is none. It is claimed for that purpose. Cannot state positively what is in the SW. corner. I think this lime rock extends into that subdivision, though I cannot state positively.

In the 40 acres south of the west half of the Sioux Quarry discovered lime strongly impregnated with iron, at excavation No. 3. On the twenty acres south of the east half of the Sioux don't know that any thing was exhibited; on the twenty south of that claimed by protestants there was sand rock; it crops distinctly; am not sure that it is on the land claimed; there are two or three openings there, but don't know when or by whom they were made.

From all the testimony I think it is clear that the location was originally made for the lime stone which had previously been disclosed in excavation No. 3, and that there was no other discovery on any other portion of the land upon which to base location. And it is equally clear that the principal value placed upon that portion of the land

by the witnesses for claimants, upon which the houses are situated, is not for the sand stone they now claim to exist there, but solely as a convenient route for transportation to and from the lime stone quarry.

It is but fair to the claimants to state that they claim that the sand stone, in addition to being useful as building material, has a special quality of endurance against heat, which makes it valuable for furnaces.

In the first place, I think that it makes no difference as to the rights of the locators to a placer claim whether it is surveyed or unsurveyed. They are required in either instance to do all the necessary acts to perfect a location, but upon surveyed land their location shall be made to "conform as near as practicable with the United States system of public land surveys." Aside from this one requirement, there is no difference in locations on the two classes of lands.

Section 2329 of the Revised Statutes, says—

Claims usually called "placers" . . . shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims.

In order to determine what is meant by the words "under like circumstances and conditions," it is necessary to refer to Sec. 2320 (Revised Statutes), which provides, among other things, that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located." The well established meaning of this language is that after a discovery the miner may locate his lode claim of the dimensions prescribed by said section. Discovery and appropriation are the sources of right, and by all legislation, whether National, State, or Territorial, and by all mining regulations and rules, this is required. *Erhardt v. Boare*, 113 U. S., 537; *United States v. Iron Silver Mining Co.* 128 Id., 673; *O'Reilley v. Campbell*, 116 Id., 418.

These are the "like circumstances and conditions," as I view it, under which a placer claim may be located.

Now, by section 2331 (Revised Statutes) it is provided that "no such (placer) location shall include more than twenty acres for each individual claimant;" and by the preceding section it is provided that an association of persons may make a location of not to exceed one hundred and sixty acres.

It will be conceded that the individual is required to make a discovery on the twenty acres he is permitted to take. This being true, it is difficult to conceive of a construction of the law that would discriminate against the individual in favor of the many. Such was surely not the intention of the law-makers.

In my opinion there must be a discovery upon each twenty-acre tract included in a placer location of one hundred and sixty acres, and a location made of that amount of land upon a single discovery is made void, except as to the twenty acres immediately surrounding it. To construe the law otherwise is to open the doorway for the appropriation of the

public lands that would be doing great violence to the intent and meaning of the mining law.

It is intimated in your said office decision that the location being an entirety, but one discovery is sufficient, and cite the case of Lincoln Placer (7 L. D., 81) as an authority for that proposition. That case is in no sense applicable to the one at bar, nor does it sustain, even by inference, the proposition. In that case the application to enter the placer claim was rejected because the survey had not been made "in accordance with the location notice upon which the survey had been ordered," as prescribed by the rules. While the decision is not very clear upon the facts, yet I take it that the application for an official survey was made upon the original location certificate, but the survey was made in accordance with an amended location notice, filed the same day the survey was made. The application for patent was therefore rejected. The paragraph which your office decision must have adopted as authority in the case at bar is as follows—

Your office holds as one ground of cancellation of the entry, that "it is not satisfactorily shown, that mineral has been discovered within the ground claimed in addition to the ground originally located, or that any improvements have been made thereon." The claim as amended is an entirety and it is not necessary that the improvements should be upon any particular part thereof, and the report as to the mineral character of the claim is sufficient, in the absence of anything bringing in question the *bona fides* of the claimant, or tending to show that the ground added by the amendment is valuable or is sought for any other than mining purposes.

The rule there announced is simply a reiteration of the well-established doctrine that "improvements" upon any part of the claim made for the development or convenient working of the same is for the benefit of the whole claim as an entirety. The term "improvements" has a well-established meaning in mining nomenclature, and the statutes as well, and does not necessarily have any connection with the location or discovery

Your said office decision is therefore reversed, and the mineral entry will be canceled; but the claimants will be permitted to make location, in accordance with this decision, of twenty acres in the immediate vicinity of their original discovery.

Approved:

JOHN I. HALL,

Assistant Attorney General.

RAILROAD GRANT—ADJUSTMENT.

ST. PAUL AND NORTHERN PACIFIC R. R. Co. ET AL.

Lands certified as indemnity under the grant of March 3, 1857, but falling within the granted limits as extended by the act of March 3, 1865, must be reckoned in the adjustment as granted lands. If not subject to selection, as indemnity, when certified, nor in a condition to pass at the time of the passage of the act of 1865, the company can have no rightful claim thereto.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (F. W. C.)

I have considered the answers forwarded with your letter of September 14, 1893, to the rules served upon the St. Paul and Northern Pacific and the St. Paul, Minneapolis and Manitoba Railway Companies, to show cause why demand should not be made upon them to reconvey to the United States, as contemplated by the act of March 3, 1887 (24 Stat., 556), certain lands erroneously certified or patented on account of the grant made by the acts of March 3, 1857 (11 Stat., 195), and March 3, 1865 (13 Stat., 526).

The lands referred to are divided into two lists "A" and "B".

List "A" contains lands within the six mile or granted limits under the act of March 3, 1857 (*supra*).

The map showing the line of definite location of the road opposite these lands was filed December 5, 1857.

The list is compiled from the records of your office and contain, apparently, all the lands to which a claim existed at that date.

These claims consist generally of pre-emption filings.

The greater number of them had been filed before the definite location of the road, but a large number of them were filed after the definite location, alleging settlement prior to such location.

None of these claims were ever perfected, so that as to the claims filed after the definite location of the road, the holding that the lands were erroneously certified rests upon the bare allegation of settlement antedating the location of the road.

As to all filings made after the definite location of the road, I do not consider them sufficient, in the absence of proof of prior settlement, to defeat the grant. As to all such lands in list "A" I have to direct that the rule be dissolved. As to the remaining lands, the filings were subsisting claims at the date of the definite location of the road, and warrant making demand for their reconveyance. See *Holm v. St. Paul, Minneapolis and Manitoba Railway Co.* (14 L. D., 656).

List "B" includes lands that were within the indemnity limits under the act of March 3, 1857 (*supra*), but fell within the ten mile granted limits as extended by the act of March 3, 1865 (*supra*).

The greater number of the tracts included in this list were certified as indemnity prior to the passage of the act of 1865. At the time of

their certification it was the practice to make up the lists in your office, the company not being required to make formal selection.

For this reason it is urged that the certification of such lands was, in effect, an adjudication of the question as to whether there was any such claim to the lands as would prevent the acquirement of title under the grant.

The same contention might be urged in every case where the lands were erroneously certified.

It is admitted that the certifications were made in accordance with rulings in force at the time, but this has been held to be no defense to action under the act of March 3, 1887 (*supra*), where, upon adjustment of the grant, the certifications are found to have been erroneously made. See *Winona and St. Peter R. R. Co.* (9 L. D., 649).

The fact that the company was not required to make formal selection of the lands can not benefit the company.

While the greater number of the tracts were certified as indemnity, yet the lands having fallen within the granted limits as extended by the act of 1865, must be reckoned, in the adjustment, as granted lands. If they were not subject to selection, as indemnity, when certified, nor in a condition to pass at the time of the passage of the act of 1865, I must hold that the company can have no rightful claim to them and my plain duty under the act of 1887 is to demand their reconveyance.

As to all such lands therefore, included in list "B", as were embraced in subsisting claims, properly allowed, at the time of the certification, and on March 3, 1865, I hold that the same did not pass under the grant and that demand should be made for their reconveyance.

The answers to the rules call attention to numerous errors in the lists, to which I direct your attention, and that the lists should be revised in accordance with the directions herein given before demand be made thereon.

Approved:

JOHN I. HALL,
Assistant Attorney General.

PRACTICE—ATTORNEY—NOTICE OF DECISION.

DOBER *v.* CAMPBELL ET AL. (ON REVIEW).

Attorneys in good standing, admitted to practice before the Department, are not required to file written authority to appear on behalf of their clients.

Notice of a decision to an attorney who appears in a case on acknowledged authority is notice to all counsel appearing for the party he represents.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (G. C. R.)

This case involves the NW. $\frac{1}{4}$ of Sec. 1, T. 42 N., R. 35 W., Marquette, Michigan.

Upon a contest filed by Alois Dober on September 25, 1889, a hear-

ing was had to determine the question as to the right to the land as between Dober, who alleged actual settlement thereon prior to the first day of May, 1888, and Joseph Flesheim, who on September 4, 1879, was allowed to locate supreme court scrip on the NE. $\frac{1}{4}$ of said quarter section, Alfred Kidder, who on September 29, 1879, located the same kind of scrip on the SE. $\frac{1}{4}$ of said quarter section, and Mary L. Campbell, who on September 10, 1879, was allowed to locate bounty land warrant (act of March 3, 1855), No. 49,308, on the W. $\frac{1}{2}$ of said quarter section. It appears that Campbell, by quitclaim deed, conveyed her undivided one-half interest to this land to Samuel H. Selden, on September 16, 1882.

The register and receiver held that the rights of said locators and transferee Selden were subject to the right of Dober to perfect his pre-emption claim. On appeal, your office, by decision dated December 20, 1892, affirmed that action. A further appeal brought the case to this Department. Dober thereupon moved to dismiss the appeal, on the grounds that the same was not filed within the time prescribed by the rules of practice.

The Department, on July 13, 1893 (*Dober v. Campbell, et al.*, 17 L. D., 139), sustained the motion, and accordingly dismissed the appeal.

Defendants have filed an instrument protesting against the return of the papers to your office, "without the consideration of the appeal made by them through their attorney, F. O. Clark."

It is insisted:

1. That the appeal was made promptly and by their attorney.
2. That F. O. Clark was their attorney of record, and the only attorney authorized by powers-of-attorney to make an appeal for them.

Practice Rule 106 provides that "Notice to one attorney in a case shall constitute notice to all counsel appearing for the party represented by him, and notice to the attorney will be deemed notice to the party in interest."

It appears that Messrs. Britton and Gray, of this city were notified of your office decision on the day it was rendered, December 20, 1892. It is admitted by defendants that Britton and Gray "were employed by said Clark to assist him before the Commissioner of the General Land Office and the Secretary of the Interior, if appeals should be taken to said official, by filing brief and making oral argument;" but it is insisted that attorney Clark only had the power to take the appeal, and that by the regulations of March 19, 1887 (5 L. D., 508), it is provided that only such attorneys shall be recognized who shall file their appearance, and shall also file written authority for such appearance, etc.

The regulations of March 19, 1887 (*supra*), were for the guidance of the local officers, in the admission of persons to practice before them. Attorneys admitted to practice before any of the bureaus of this

Department often file written authority from their clients, and that practice is to be commended, but it is not mandatory.

In the case of F. M. Heaton (5 L. D., 340), it is said:

The attorney or agent entering his appearance in a case should state for whom he appears and the relation of his client to the case; but there does not appear to be any good reason why all attorneys and agents "in good standing" practicing before your office or this Department should be required to file the written authority of their clients before being recognized, in the absence of circumstances impeaching their good faith.

On August 8, 1892, a letter was addressed to your office in the following terms:

We file herewith arguments in the case entitled Alois Dober *v.* Mary L. Campbell and Samuel L. Selden, now pending before your office on appeal from the decision of the register and receiver at Marquette, Michigan, dated December 18, 1890.

Very respectfully,

BRITTON AND GRAY,
Attorneys for Campbell and Selden.

Service of a copy of this argument was acknowledged by Messrs. Copp and Luckett, of this city, August 9, 1892.

It appears also that Messrs. Britton and Gray, as attorneys for defendant, acknowledged service of a copy of the argument filed in behalf of contestant.

Having thus filed an argument in your office for defendants, representing themselves as attorneys for Campbell and Selden, and having in the same capacity acknowledged service of a copy of the arguments filed by opposing counsel, Messrs. Britton and Gray, as "attorneys in good standing," were as much entitled to recognition as attorneys for defendants as if they had formally filed an appearance prior to filing any argument in the case. Having thus appeared in the case on an acknowledged authority "to assist him (F. O. Clark) before the Commissioner of the General Land Office and the Secretary of the Interior," it was proper to notify that firm of attorneys, as of counsel for defendants, of the action of your office, adverse to their clients; and since "notice to one attorney in a case shall constitute notice to all counsel appearing for the party represented by him," Mr. Clark, as an attorney in the case, must be held to have had notice through Messrs. Britton and Gray, and defendants having failed to appeal from the action of your office within the time required from the date of that notice, the appeal, filed out of time, was properly dismissed.

The motion herein must be, and it is hereby denied;

Approved:

JOHN I. HALL,
Assistant Attorney General.

PRACTICE—APPEAL—CERTIORARI.

GARDINER v. HAGGERTY.

The right of appeal from the General Land Office is properly denied where the appeal from the local office is dismissed for the want of specification of errors; and the record will not be ordered up on certiorari in such a case, unless the facts, as set forth, show that the applicant is entitled to relief under the supervisory authority of the Secretary.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894.

(G. B. G.)

Thomas Haggerty has filed in the Department an application for a writ of certiorari in the above styled case, in the matter of his application to purchase under the act of Congress approved September 29, 1890, the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 27, T. 3 N., R. 14 E., W. M., Vancouver land district, Washington.

This case was decided adversely to Haggerty by the local officers, on account of the land in controversy having previously been covered by the homestead entry of Kathleen Gardiner.

Said Haggerty had notice of this decision June 16, 1892, and on July 18, 1892, he filed simply a notice that he appealed therefrom, and served a copy of said notice on the said Gardiner, but he failed to set forth any specific points of exception to the ruling appealed from, as required by Rule of Practice 45, and as a consequence thereof, the appeal was considered deficient by your office, and dismissed on the authority laid down in *Ream v. Larson* (14 L. D., 176).

Your office then proceeded to consider the case under Rule 48 of Practice, and affirmed the finding of the local officers.

The only question to consider is the action of your office in dismissing Haggerty's appeal from the local officer's decision.

Counsel for appellant contends that inasmuch as the question involved, was a simple question of fact as to the sufficiency of evidence, submitted by him in support of final proof, and the correctness of the construction of the law, as applied to those facts by the local officers, that the notice of appeal served upon the protestant Gardiner, fully advised her of what the issue would be on appeal. How there could be more in any appeal than the questions of the sufficiency of evidence, and the application of the law, is past comprehension, and the necessity of setting forth "in brief and clear terms the specific points of exception to the ruling appealed from," is apparent in this case, even if the same could in any case be dispensed with. As a matter of fact, said Gardiner may have been fully advised of the issue on appeal, but whether she was, or was not, so advised in fact, is not material. The Rules of Practice have been adopted for the purpose of securing uniformity in the practice, and Rule 45 has been approved by the Department, and is mandatory.

There being no appeal in this case, from the decision of the register and receiver, such as is contemplated by the Rules of Practice, it follows that an appeal from your office decision was properly denied. Under the authority laid down in the case of *Anderson v. The Amador and Sacramento Canal Company* (10 L. D., 572), a writ of certiorari may be granted under such circumstances, but only when the facts set forth show that the applicant is entitled to relief under the supervisory authority of the Secretary.

Under the statement of facts in the application before me, the applicant is entitled to no such relief. For the reasons herein set forth, the petition for writ of certiorari is denied.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

FLORENCE D. DELANEY.

Motion for review of departmental decision of July 24, 1893, 17 L. D., 120, denied by Secretary Smith, February 12, 1894.

HOMESTEAD CONTEST—PRELIMINARY AFFIDAVIT—RELINQUISHMENT.

HALL v. BEASLEY.

A charge that the preliminary affidavit was executed before an officer not authorized by law to administer the requisite oath, warrants the cancellation of a homestead entry if proven.

The right of a contestant to proceed against an entry dates from the filing of his affidavit of contest, and such right can not be defeated by a subsequent relinquishment.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894.

(R. B.)

This is an appeal filed by Henrietta Beasley from your office decision, dated June 15, 1892, in the case of *Norman Hall v. Henrietta Beasley*, involving the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 14, T. 22 N., R. 6 E., Prescott, Arizona.

By said decision was reversed that of the register and receiver, dismissing Hall's contest, filed October 9, 1891, against Beasley's homestead entry, No. 690, made August 26, 1891, for the tract described. Accordingly was held for cancellation homestead entry No. 737, which Beasley, upon her relinquishment of her former entry, made for the land, December 9, 1891.

The facts are fully set out in said decision, and need not be repeated in detail.

The officer, before whom Beasley made her homestead and non-mineral affidavit, to wit, a "United States commissioner of the district court in the fourth judicial district of the Territory of Arizona," appointed by the judge of said court, and who was also an associate justice of the Territorial supreme court, was confessedly not authorized to administer the oaths required of applicants for entry under the homestead law. (Act May 26, 1890, 26 Stat., 121.) This is one of the two charges laid in complaint.

Hall is therefore entitled to a judgment of cancellation; for Beasley's relinquishment and second entry were subsequent to Hall's contest, and Hall has preserved his rights by appeal and proved the charge referred to. His right as a successful contestant dates from the filing of his affidavit, and can not be defeated by Beasley's relinquishment. (*Webb v. Loughrey et al.*, on review, 10 L. D., 302.)

The judgment holding Beasley's homestead entry, No. 737, for cancellation is affirmed.

Approved,

JOHN I. HALL,

Assistant Attorney General.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

H. B. KETCHAM.

Where the record calls for an inquiry as to the good faith of a transfer, in determining whether an entry is confirmed by section 7, act of March 3, 1891, the government is not precluded therefrom by its own proceedings prior to the passage of said act in which the status of the transferee was not involved.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894.

(F. W. C.)

I have considered the appeal of H. B. Ketcham, transferee, from your office decision of June 6, 1890, refusing to reinstate pre-emption cash entry No. 323, by Clement H. Barnes, for the SW. $\frac{1}{4}$, Sec. 9, T. 1 S., R. 38 W.; Oberlin land district, Kansas.

This entry was held for cancellation by your office letter of August 21, 1885, upon a special agent's report, alleging that Barnes was under twenty-one years of age when he made said entry; that he did not maintain a residence upon the land, and that the entry was made in the interest of one H. B. Ketcham, to whom he conveyed the land, September 3, 1884.

Barnes was notified of said decision, and failing to appeal therefrom, the entry was canceled by letter of February 10, 1886.

It appears that no notice of these proceedings was served upon Ketcham, the purchaser, but, upon hearing of the cancellation of the

entry, he appealed to this department, the matter being considered March 10, 1888, and you were directed to order a hearing "at which Ketcham will be allowed to show the validity of the entry of Barnes."

At the hearing held under this order, witnesses were introduced on behalf of the government, but Ketcham offered no testimony to sustain the entry of Barnes. He demurred, "for the reason that all the testimony introduced wholly fails to show by any competent proof that Clement H. Barnes did not in fact comply with the requirements of the pre-emption law with reference to the land in controversy," and moved that the action on the part of the government be dismissed.

The local officers overruled the demurrer, and recommended that the entry be canceled, for the reason "that the charges of the government *as to claimant's residence and improvements* are fully sustained by the evidence." Your office decision sustains the local officers, and states that "it appears of record that March 15, 1888, John C. Corey made pre-emption cash entry, No. 6061, on the tract, and that said entry is still standing."

A motion has been filed on behalf of the estate of Ketcham, for the confirmation of the entry by Barnes under the 7th section of the act of March 3, 1891 (26 Stat., 1095). Said section provides that:

All entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificate issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance.

In this case final proof and payment has been made and certificate issued; there is no adverse claim originating prior to final entry by Barnes, and he sold to Ketcham after final entry and before March 1, 1888.

The decision holding the entry for cancellation did not become final as to Ketcham, the transferee, for the reason that he had no notice thereof, and at his request a hearing was ordered, as before set forth.

The only obstacle to confirmation under the act is, that there are facts in the record indicating bad faith on the part of the purchaser. As against this it may be urged, that the government is bound by its failure to make its showing upon this subject at the hearing heretofore held upon the special agent's report. While there was a charge of bad faith on the part of the transferee in the agent's report, yet, prior to the passage of the act of 1891, the transferee was held to stand in the shoes of the entryman, and while he might be heard in support of the entryman's claim, yet, if it were shown that the entryman failed to comply with the law, the fact that there was a transferee gave no validity to the entry, and the bona-fide character of the transfer need not be inquired into.

Having clearly shown that the entryman resided elsewhere than on the land in question during the period covered by the final proof, the agent rested the government's case. This was sufficient at the date of the hearing to cancel the entry. The transferee refused to offer any testimony in support of the entry, or as against the charge of the special agent.

Appeal was taken from the judgment of the local officers, upon the record as made, and again from your opinion sustaining the decision of the local office. The latter appeal was pending at the date of the passage of the act of 1891. This act confirms only such entries as were sold prior to March 1, 1888, to *bona fide* purchasers.

Can it be said that a party procuring another to make entry for his benefit is a *bona fide* purchaser?

At the time of this hearing, as before shown, the question of *bona fide* purchaser was not involved. Under what rule of law could it be held then, that the government was in default in not showing at the hearing that Ketcham was not a *bona fide* purchaser.

Laches can not be imputed to the crown, or the government. It would therefore seem to be the plain duty of the government to determine whether this party is a *bona fide* purchaser, in view of the allegations contained in the agent's report, and the affidavit of one Hoffman accompanying the same, before it is held that the entry is confirmed.

In the instructions to chiefs of divisions, under this act, dated May 8, 1891 (12 L. D., 452), it is stated

any facts appearing in the record, which indicate bad faith on the part of the purchaser or encumbrancer, or collusion between him and the entryman, should justify an investigation by the proper agents of the government and this statute will not be construed as prohibiting such investigation for the purpose of determining as to the good faith of the purchaser or encumbrancer.

I am therefore of the opinion that a further hearing should be ordered, after due notice to the administrator of the transferee, it appearing that Ketcham has recently died, at which the *bona fide* character of the transfer to Ketcham may be inquired into.

Notice of such proceedings might also be given Corey, who has been permitted to make entry since the cancellation of the entry by Barnes, that he may enter an appearance if he so desires.

Approved,

JOHN I. HALL,

Assistant Attorney General.

UNITED STATES *v.* LANGDON ET AL.

Application for rehearing in the case above entitled (see 16 L. D., 358), considered and denied by Secretary Smith, February 12, 1894.

DESERT LAND ENTRY—CONTEST—EQUITABLE ACTION.

THOMPSON v. BARTHOLET.

The right of a desert land entryman, who fails to effect reclamation within the statutory period, to equitable action on his entry, is not defeated by the intervention of a contest charging such failure, where there is no want of diligence, or good faith, on the part of the entryman, and his default is due to obstacles he could not control, and where he is engaged in curing said default when his entry is attacked.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894.

(W. F. M.)

I have examined the case involving desert land entry No. 149, North Yakima land district, Washington, made by Mrs. Anna Maria Bartholet on December 20, 1886, and embracing the NE. $\frac{1}{4}$, N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 26, T. 11 N., R. 20 E.

On January 14, 1890, Fred E. Thompson filed his affidavit of contest in which he made the usual allegations of non-compliance with the law.

After hearing on August 4, 1890, the register and receiver recommended the cancellation of the entry, and from your office decision sustaining the action of the local officers the case is on appeal before me.

As to the principal and decisive facts of the case there is scarcely room for disagreement. It is admitted that complete reclamation was not accomplished within the statutory period of three years, and, on the other hand, it is abundantly shown that the claimant, who died in 1888, owned, at the date of the entry, ample water supply for the purpose of reclamation; that her heirs and legal representatives prosecuted the work with indisputable good faith and vigour, and continued after contest up to the hearing. The water supply was obtained from the Yakima river, through a ditch over twenty miles in length, and it appears that after the ditch was nearly completed a change in the river channel rendered additional work at the head of the ditch necessary in order to secure the requisite amount of water, and that thereafter, a number of breakages occurred along the line of the ditch, so that the work of irrigation was further delayed, and that through no fault or want of diligence on the part of the claimants. Neither the opinion of your office, nor that of the register and receiver, advert to the circumstance that during the period intervening between contest and hearing, water was actually conveyed on to the land. Under the view taken of the case in these opinions, the fact was an immaterial one, but, when considered in connection with the additional fact that at the time of attack the contestee was diligently engaged in efforts to cure his default, I regard it as being decisive of the controversy. The contestant stands upon the bald proposition that notwithstanding the good faith of the claimant and the expenditure of some four thousand dol-

lars upon and in the interest of the claim, this Department can afford no relief in the face of a contest, from the strictness of the statutory requirements with respect to final proof.

In view of the facts of the case, which I do not conceive it necessary to analyze or state in detail, I cannot concur in the conclusions reached by your office. I am supported in this view by the well considered case of *Meads v. Geiger* (16 L. D., 366), in which the facts are almost identical with those of the case now under consideration. Distinguishing that case from *Lee v. Alderson* (11 L. D., 58), in which it was held that the right of a desert land entryman in default was defeated by a contest, the following language was used:

This general proposition is unquestionably correct. The two cases, however, are widely distinguished in this respect, that in the case cited the entryman made no effort toward the construction of his ditches until within five months of the expiration of the entry, and that his subsequent efforts were not effectual, while in the case at bar the defendant was at no time remiss in the matter of diligence, and was finally successful in securing water sufficient for the purposes of irrigation. In one case the default was of such grave character that it could not well be cured while under attack, although an effort in that direction had been previously commenced; while in the other through the unremitting diligence of the entryman reclamation was nearly effected before the contest was begun.

For the benefit of claimants occupying the attitude of the defendant in the case just quoted from, where the equities are strongly in their favor, that case invokes the protection of the board of equitable adjudication.

This ruling in effect rests on the proposition that the right of a contestant in such a case is not an "adverse claim" that will defeat equitable action.

The jurisdiction of the board of equitable adjudication rests primarily on sections 2450-2457 R. S., which authorize the formation of rules for the confirmation of suspended entries "upon principles of equity and justice as recognized in courts of equity, and in accordance with regulations to be settled by the Secretary of the Interior, the Attorney General, and the Commissioner, conjointly." Section 2451 provides that such adjudication "shall operate only to divest the United States of the title of the lands embraced thereby, without prejudice to the rights of conflicting claimants." Section 2457 further provides that the jurisdiction of the board shall extend to cases "where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained; and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim."

Under this authority certain rules regulating equitable action have been formulated among which is rule 30 (6 L. D., 799), made applicable to

all desert land entries in which neither the reclamation nor the proof and payment was made within three years from date of entry, but where the entryman was duly

qualified, the land properly subject to entry under the statute, the legal requirements as to reclamation complied with, and the failure to do so in time was the result of ignorance, accident or mistake, or of obstacles which he could not control, and where there is no adverse claim.

The case at bar is clearly within this rule if the right of the contestant is not an "adverse claim." If it is such a "claim" then the case is excepted from the operation of the rule. The status of a contestant under the law becomes, therefore, an essential point for determination herein.

Section 2, act of May 14, 1880 (21 Stat., 140), provides that

In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry he shall be notified of such cancellation, and shall be allowed thirty days from the date of such notice to enter said lands.

This act has been held applicable to contests against desert land entries. (*Fraser v. Ringgold*, 3 L. D., 69.)

A contest being filed and accepted, the right of the contestant therein is to pursue the prosecution of the suit to a final determination, and if successful to receive as a reward for his services the preferred right to enter the land involved in his contest. His ultimate right, then, is dependent upon his success in showing a statutory cause for the cancellation of the entry under attack. If his contest for any reason fails to secure cancellation of the entry, he has no standing under the act of May 14, 1880, nor could the intervention of such a contest be regarded as an "adverse claim" within the contemplation of the rule cited above, for the Department has uniformly held that where a contest fails the issue then is solely between the government and the entryman. *Platt v. Vachon*, 7 L. D., 408; *Meyhok v. Ladehoff*, 9 id., 327; *Sewell v. Rockafeller*, 10 id., 232; *Tyndall v. Prudden*, 13 id., 527; *Truex v. Raedel*, 16 id., 30.

Is the contestant herein entitled to a decree of cancellation? Has he shown facts that necessarily require cancellation? If he has not, his contest fails and there is no bar to equitable action on the entry.

The Department holds, in an unbroken line of decisions, that where the entryman, in good faith, is engaged in the act of curing a default at the time when a contest is begun, the contest must fail. *Boulware v. Scott*, 2 L. D., 263; *Stanton v. Howell*, 9 id., 644; *Sewell v. Rockafeller*, 10 id., 232; *Gregg v. Hallock*, id., 373; *Fansey v. Torgersen*, 11 id., 252.

The facts in this case bring it clearly within the line of decisions cited. The evidence submitted by the contestant does not entitle him to a judgment of cancellation. No bad faith or want of diligence is shown on the part of the entryman. He was at the time when the contest was initiated engaged in the act of completing the irrigation which had then been nearly accomplished. The claim of the contestant having been examined, and not found well grounded, disappears, and there is no longer an "adverse claim" to prevent equitable action.

In other words, the facts herein, with respect to reclamation, if shown by the entryman would entitle him to an equitable confirmation of his entry, and it can not be seriously maintained that the same facts when related by the contestant should call for cancellation.

The recent case of *Cooke v. Villa*, (17 L. D., 210), is not in conflict with this view. That was a homestead case in which the entryman *neglected* to make final proof within the lifetime of his entry, and the Department held that his neglect was fatal in the presence of an intervening contest. In this case there is no neglect shown on the part of the entryman. He was diligent from the first.

The register and receiver, in their opinion recommending cancellation of the entry, use these suggestive words:

It would seem, however, that where such an abundance of good faith has been manifested by the parties, in an endeavor to reclaim the land, some means should be devised to afford appropriate relief.

It is proper to note that this equitable expression ante-dated some six months the rendering of the opinion reported in 16 L. D., 366 which, henceforth, will furnish a safe guide in administering the equities in similar cases.

The decision of your office is reversed, the contest dismissed, and the entry referred to the Board of Equitable Adjudication.

Approved:

JOHN I. HALL,

Assistant Attorney-General.

DESERT LAND ENTRY—ACTS OF 1875 AND 1877.

SIMEON D. WYATT.

A desert land entry, or declaration of intention to make entry, made under either the Lassen county act of 1875, or the general act of 1877, exhausts the right of entry under the desert land laws, and precludes the allowance of a second entry.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894.

(J. L. McC.)

On May 1, 1890, Simeon D. Wyatt filed his declaration in the local land office at Susanville, California, stating that he intended to reclaim the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of Sec. 29, T. 29 N., R. 14 E. (four hundred and eighty acres), under the Lassen county desert land act of March 3, 1875. (18 Stat., 497.)

On the 16th of July, 1890, he made desert land entry, in the same land office, under the act of March 3, 1877 (19 Stat., 377), for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the S. $\frac{1}{2}$ of Sec. 20, the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 29, T. 29 N., R. 14 E., M. D. M. This entry embraced six hundred and forty acres, and the land covered thereby was situated

immediately north of the four hundred and eighty acres contained in his declaration of May 1, 1890.

On the 1st of November, 1890, he made final proof of reclamation on both tracts, and cash certificate No. 2622 was issued on the former, and desert land final certificate No. 164 on the latter.

On the 16th of January, 1892, your office considered the matters presented by the case, and rendered a decision therein, holding that Wyatt had exhausted his rights under the desert land laws by his declaration of May 1, 1890, and that his later entry was illegal. Your office therefore held his entry made on the 16th of July, 1890, under the act of March 3, 1877, for cancellation.

He brings the case to the Department upon an appeal from said decision, alleging that it was erroneous in the following particulars:

1. In holding that a desert land entry made in the county of Lassen, under the act of March 3, 1875—known as the Lassen county desert land act—exhausts the rights of the entryman under the act of March 3, 1877, known as the general desert land act.

2. In holding that Congress did not intend to give additional rights, under the first of said acts, to a person making entry of desert lands in said county of Lassen.

3. In holding said entry for cancellation.

It is unnecessary to decide whether the act of 1877 *repealed* that of 1875. A comparison of the two acts show that they are alike in every essential particular. The amount of land that may be entered is the same in both; the proof is to be made before the same officers; more than half of the language of the earlier act is quoted verbatim into the later act; but the time within which reclamation must be made is extended from two years to three years; the provisions of the former are extended from one county in California, and made applicable to three States and eight Territories. No one can read and compare the two acts without arriving at the conviction that the later one was intended as a *substitute* for the earlier one. But in the later act, Congress, with the text of the earlier act before it, *added* the following proviso:

That no person shall be permitted to enter more than one tract of land, and not to exceed six hundred and forty acres, which shall be in compact form.

In view of this proviso, I can not believe that Congress intended that, in one county in the United States, two entries, to the aggregate of 1280 acres, might be made by one person.

I therefore concur in the conclusion of your office that the making of an entry, or filing of a statement of intention to make entry, under either of said laws, whether within Lassen county or elsewhere, exhausts a person's right under the desert-land laws of the United States, and no second entry can be allowed.

Your office decision is affirmed.

Approved:

JOHN I. HALL,

Assistant Attorney General.

RAILROAD GRANT—ACT OF JUNE 22, 1874.

TRONNES v. ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The act of June 22, 1874, extending the time for the completion of the road, in aid of which the previous grant had been made, and protecting the rights of actual settlers at the date of said act, required the company to file its acceptance of the terms imposed thereby, but the protective provisions therein, for the benefit of settlers, are not dependent upon the company's acceptance of the act.

The conditions on which the extension of time was given by Congress in said act operate as a revocation of the grant to the extent of the rights of actual settlers at the date thereof. It is in effect an extension of the protection intended to be given by the excepting clause in the original grant, and is applicable to all lands whether patented or otherwise.

The certification of lands prior to the passage of said act in no wise affects the right of an actual settler protected thereby, nor does it embarrass the Department in extending to such settler the protection of said act.

The case of *Kemper v. St. Paul and Pacific R. R. Co.*, 2 C. L. L., 805, overruled.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894.

(F. W. C.)

I am in receipt of your letter of March 30, 1892, transmitting the record arising upon a rule served upon the St. Paul, Minneapolis and Manitoba Railway Company to show cause why demand should not be made upon said company to reconvey the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and lots 2 and 4, Sec. 1, T. 146 N., R. 49 W., Crookston land district, Minnesota, to the United States, as contemplated by the act of March 3, 1887 (24 Stat., 556).

The tract here in question is within the primary limits of the grant for said company, upon the line known as the St. Vincent Extension of said road, as shown by the map of definite location filed and accepted December 19, 1871.

The act of March 3, 1865 (13 Stat., 526), required that the road be completed by March 3, 1873, which time was extended to December 3, 1873, by the act of March 3, 1873 (17 Stat., 631).

The company listed this tract November 28, 1873, and the list containing this tract was approved by this Department April 30, 1874, and patent issued January 14, 1875.

The company failed to build the road within the time allowed, and by the act of June 22, 1874 (18 Stat., 203), the time was again extended to March 3, 1876, upon the following conditions:

That all rights of actual settlers and their grantees who have heretofore in good faith entered upon and actually resided on any of said lands prior to the passage of this act, or who otherwise have legal rights in any of such lands, shall be saved and secured to such settlers or such other persons in all respects the same as if said lands had never been granted to aid in the construction of the said lines of railroad.

Section 2 of the act provides:

That the company taking the benefit of this act shall before acquiring any rights under it, by a certificate made and signed by the president and a majority at least of the directors, and sealed with the corporate seal, accept the conditions contained in this act, and file such acceptance in the Department of the Interior for record and preservation.

The road opposite this tract was constructed during the summer of 1873, and its construction was duly certified to by the governor of the State, November 22, 1873.

On October 8, 1874, Andrew O. Tronnes filed declaratory statement No. 1207, for the land in dispute, alleging settlement June 3, 1872.

Tronnes offered proof under said filing in 1882, and the same was rejected and his filing canceled, for the reason that he did not declare his intention to become a citizen until 1873, subsequent to the date of the attachment of the rights of the company under its grant.

In the case of *Kemper v. St. Paul and Pacific Railroad Company* (2 C. L. L., 805), it was held, referring to the act of June 22, 1874 (*supra*):

The company never complied with the requirements of the act, and therefore obtained no extension thereby. The act never having become operative as to the company, it conferred no rights upon the settlers. Had the company complied with the terms of the act, it would have been a forfeiture of such lands as had been actually settled upon, and the rights of the settlers and their grantees would have been protected.

But the company not having accepted or complied with the terms and conditions of the act, I am of the opinion that it is inoperative for any purpose.

The question as to the effect of this act was considered by the United States supreme court in the case of the *St Paul, etc., R'y Co. v. Green-algh* (139 U. S., 22), wherein it was held:

The road of the plaintiff under consideration here was not completed till November, 1878, and consequently the rights granted to the company were subject to forfeiture, or at least the company was subject to hostile proceedings, for breach of this condition attached by law to the grant. A mere breach of condition does not of itself work a forfeiture of a grant; some other proceeding must be taken by the grantor to indicate his dissatisfaction with the breach and his intention to exercise his rights to revoke the grant and take possession of the property in consequence thereof. While in this case no specific action was taken by Congress to work a forfeiture of the grant, or by the State, yet the continued possession and use of the property by the company were, in fact, subject to the condition that the rights of settlers upon the lands at the time should not be interfered with, where such settlements had been made in good faith, as was the case in the present instance.

It is true that in this case the court holds that the act was accepted by the company, on account of its continued assertion of ownership of the road and other property after the expiration of the time for completing the road, in the absence of proof to the contrary.

It is now urged by the company that:

This is not a case before the court in which it is incumbent upon the company to prove its non-acceptance of the act. On the contrary, it is a case before the land department, the Department of the Interior. The second section of the act of 1874 required the certificate of acceptance, without which the act could not become

operative, to be filed in that department. The department is thus made the custodian of the certificate; its officers, in their official capacity, know whether or not such certificate was ever filed; and in passing upon questions in which the acceptance or non-acceptance of the act is involved they are bound to take judicial notice of the fact. Having this knowledge, neither the Secretary of the Interior, nor the Commissioner of the General Land Office can close their eyes to the fact that the certificate of acceptance was not made and filed, and presume an acceptance from the company's retention of the road and land grant.

I am unable to agree with this contention.

While it is true that the company was by the act required to accept its provisions and file the same in this Department before acquiring any rights thereunder, yet, as held in the case of *St. Paul & C. Railway Co. v. Greenalgh* (*supra*):

It would be in the highest degree inequitable to allow the company to have all the benefits of the extension of time to complete its road, so as to avoid any forfeiture of its privileges and franchises, without at the same time holding it to the conditions affecting the rights of settlers upon the lands of the company, in consideration of which the extension was made.

It is no answer to this position to urge that the supreme court has repeatedly recognized the right of a railroad company to retain its land grant after a failure to complete its road within the time required, without the aid of an extension, or until advantage is taken of the breach by the grantor.

The purpose of the act of June 22, 1874, was double—it was (1) to extend the time within which to build the road, and (2) to protect settlers then upon the land.

Acceptance of the act was not necessary to give validity to that portion of it which protects settlers. The railroad company had failed to complete its road within the time prescribed by statute—its grant could have been forfeited outright, or any other terms less than actual forfeiture could have been imposed by Congress. Rather than forfeit the grant, Congress chose to extend the time within which the road should be completed, upon the express condition that the rights of settlers should be respected as though no grant had ever been made.

The section of the act which provides for acceptance by the company of its provisions was not intended to, and does not, in any wise, affect the rights of settlers. If the railroad company had filed a written acceptance of the terms of the act, Congress could not have forfeited the grant for a failure on the part of the company to complete its road within the extension of time. The failure of the company to file such acceptance placed it in the power of Congress to forfeit the grant for failure to complete the road, but a failure on the part of Congress to forfeit the grant conferred no rights whatever upon the company in conflict with the rights of settlers.

The road not having been completed within the required time, Congress had a right to impose a new condition, in extending the time. *New Orleans Pacific Railway Company v. United States*, 124 U. S., 124.

I am therefore of the opinion that the act is operative for the protec-

tion of settlers, notwithstanding the company's failure to file its acceptance of the same.

It is further contended by the company that:

If it were conceded that the company by its continued claim of title under the land grant accepted the conditions of the act of 1874, this case is not within the provisions of the act, nor is it a case parallel with that of Greenalgh. There is a marked distinction between the two cases. In the Greenalgh case the land had not been conveyed to the company, either by certification or patent.

The act of June 22, 1874 (*supra*), provides: "That all rights of actual settlers shall be saved and secured to such settlers in all respects the same as if said lands had never been granted to aid," etc.

This language is general and applies to all lands, whether patented or not patented, upon which there were actual settlers June 22, 1874. To the extent of the rights of actual settlers, the condition upon which the extension of time was given by Congress operates as a revocation of the grant. The status of lands occupied by actual settlers was declared to be as though they had never been granted. It is, in effect, an extension of the protection intended to be given by the excepting clause in the original grant, and, hence, in its administration, all lands coming within the terms of the act of June 22, 1874, *supra*, must be disposed of as though no patent had been issued.

The lands here in question being within the primary limits, passed by the force of the grant, if at all, and the listing and approval added nothing to the company's title.

In the cases of the New Orleans Pacific Railway Company (14 L. D., 321), and the same company against Sancier (14 L. D., 328), the effect of a certification, where there had been a declaration of forfeiture, was considered, and it was held that the outstanding certification did not constitute title in the State, and that the act of forfeiture operated to restore the lands to the public domain free from the effect of the original grant and the certification thereunder.

I am therefore of the opinion that the fact that the land had been certified prior to the passage of the act of June 22, 1874 (*supra*), in no wise affects the right of Tronnes, who, in the former proceedings had in this Department, has already shown that he was an actual settler upon the land since long prior to the passage of said act, nor does it embarrass this Department in extending to him the provisions of said act.

As before stated, Tronnes's filing was canceled for conflict with the grant, but, as now shown, such action was error, and, under the 3d section of the act of March 3, 1887 (24 Stat., 556), he should be reinstated in his rights, and permitted to complete entry of the land.

The decision in the Kemper case (*supra*) is overruled, as is also that of the Department rejecting Tronnes's claim to this land.

Approved,

JOHN I. HALL,

Assistant Attorney General.

RAILROAD GRANT—MINERAL LAND—MILL SITE.

MONGRAIN *v.* NORTHERN PACIFIC R. R. Co.

It is only non-mineral land that can be appropriated as a mill site; and an application therefor must be rejected where the land is embraced within a prior railroad grant that passes title to lands of such character. *

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894.

(P. J. C.)

The land in controversy is in Sec. 17, T. 10 N., R. 14 W., Helena, Montana, land district. It appears that on December 9, 1886, this tract (with others) was embraced in selection list No. 13 by the Northern Pacific Railroad Company, under its grant of July 2, 1864 (13 Stat., 365), the land lying within the granted limits of the grant to said company, its map of definite location having been filed July 6, 1882.

On August 25, 1885, the Silver Hill lode claim was located, and December 10, following the mill-site was located. On February 7, 1891, Charles E. Mongrain *et al.* tendered an application for patent for said Silver Hill lode claim and mill-site, surveys Nos. 3079A and 3079B, and the same was rejected because of said selection by the railroad company.

On application of the mineral claimants a hearing was ordered to determine the character of the land, which was had before the local officers April 16, 1891, and, not being able to arrive at a conclusion from the testimony taken, the register and receiver ordered a further hearing, which was had April 5, 1892. From the testimony taken at the two hearings, they decided in favor of the mineral claimants, and on appeal by the railroad company your office, by letter of November 2, 1892, affirmed their decision, whereupon the railroad company prosecutes this appeal.

From a careful examination of the testimony I am satisfied that your said office decision fairly and sufficiently states the facts disclosed as to the lode claim, and I see no reason for disturbing the judgment of the local officers, as affirmed by your office, to the extent of the lode claim proper (Central Pacific R. R. Co. *et al. v. Valentine*, 11 L. D., 238).

But I do not think entry should be permitted of the mill-site. As shown by the plat of the official survey, the mill-site is contiguous to the lode claim. There was no testimony offered at the hearing as to the character of the land included in the mill-site, or in reference to it in any way, but the return of the deputy mineral surveyor is—

The mill-site (survey No. 3079B) contains no known mine of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other precious metals, nor are there any deposits therein, commonly called placer, either claimed or known to exist in said mill-site.

But independently of this, the land could not be taken as a mill-site as against the railroad company. It is only non-mineral land that can be thus appropriated. Sec. 2337 (Revised Statutes), under which patent may be procured for mill-sites, reads as follows—

Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and the payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.

It being non-mineral land, it passes to the company under its grant, and it is only that portion of the land included within the grant that is valuable for its mineral deposit that is excepted from it. The mill-site application for patent should be rejected and the location canceled. *Keystone Lode and Mill Site v. State of Nevada*, 15 L. D., 259.

The judgment of your office is therefore modified to this extent.

Approved:

JOHN I. HALL,

Assistant Attorney General.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT RIGHT.

SPAULDING *v.* NORTHERN PACIFIC R. R. CO.

The right of one holding under a purchase from the railroad company is no bar to the selection of the land as indemnity.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894.

F. W. C.

I have considered the appeal by the Northern Pacific Railroad Company, from your office decision of December 12, 1888, sustaining the action of the local officers in rejecting the attempted selection of lots 1, 2, and 3, Sec. 13, T. 1 N., R. 42 E., Walla Walla, Washington, by said company as indemnity on account of the claim of one Henry H. Spaulding, under the pre-emption laws.

This land is within the limits of the withdrawal upon the map filed February 21, 1872, showing the line of amended general route, but upon the definite location of the road (October 4, 1880), it fell within the indemnity limits, and the company attempted to make selection thereof September 24, 1884, and appealed from the rejection of its list.

For the disposition of this case it is unnecessary to consider the effect of the several withdrawals covering this land, it being sufficient to

look to the status of the land at the date of the attempted selection by the company.

In 1877 Spaulding tendered a pre-emption declaratory statement for this land, alleging settlement in November, 1872, which was rejected for conflict with the grant, and upon appeal said action was sustained by your office letter of August 28, 1880.

No further action was taken by Spaulding towards prosecuting his claim under the pre-emption laws, but the case arising upon his application never having been formally closed, the matter was re-considered by your office *sua sponte* and by letter of November 29, 1886, a hearing was ordered.

At this hearing it was shown that Spaulding, after the adverse decision of your office on August 28, 1880, made application to the company for title, and at his request the company selected the land and contracted to sell to him for \$4.50 per acre.

Under said contract he had, at the date of the hearing, made several payments, and admitted that he had leased, for a term of ninety-nine years, to different parties, tracts aggregating forty acres.

When asked at the hearing if it was not his desire and wish that the company should secure title to the land, he replied:

I would state I would prefer if I could get good title from the company that the company be permitted to select the land, but if not, I want to get it under my pre-emption right from the government. That already I have made several payments on this land.

From a review of the matter, I am of the opinion that Spaulding did not have a valid claim to the land under the settlement laws at the date of the company's attempted selection thereof, which selection was made, in accordance with agreement, for his protection.

Having leased about forty acres of the land he could not acquire title under the settlement laws, and from his own statements he was holding the land at the date of the company's selection, not as a settler under the public land laws, but as a purchaser from the company.

I must, therefore, reverse your office decision and direct the allowance of the company's selection if otherwise regular and valid.

Approved:

JOHN I. HALL,

Assistant Attorney General.

PAULSEN *v.* ELLINGWOOD.

Motion for review of departmental decision of July 6, 1893, 17 L. D., 1, denied by Secretary Smith, February 12, 1894.

PENDING CONTEST-RELINQUISHMENT. I

HOLMAN *v.* KNAPPEN.

Failure of the local office to order a hearing on a charge that calls for such action, will not defeat the right of the contestant as against the subsequent relinquishment of the entry under attack and the intervening entry of another.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (J. L.)

I have considered the appeal of William B. Holman from your office decision of September 27, 1892, in the case of William B. Holman *v.* Theodore F. Knappen, affirming the rejection by the local officers of Holman's application to make homestead entry of the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 21, T. 56 N., R. 24 W., 4th p. m., Duluth, Minnesota, land district.

Your office decision refers to and is based upon your office letter of May 6, 1892, which was a final decision in the case of Theodore S. Knappen *v.* The State of Minnesota, and necessarily brings before me for supervision the record and proceedings in that case also.

On March 22, 1890, Theodore F. Knappen, of Minneapolis, Minnesota, filed at the St. Cloud land office, an application to make homestead entry of the tract of land in contest, which was not allowed, because said tract had been selected and was claimed as swamp-land under the act of March 12, 1860, by the State of Minnesota, which had elected to make the field notes of the government surveys the basis for determining what lands passed to her under said grant. Whereupon, on the same day, March 22, 1890, Knappen filed his affidavit of contest against the State of Minnesota, duly corroborated, and alleging that the "majority" of said tract is not swamp-land, but high, dry and arable land; and his application to enter was held without action to await the result of the contest.

On June 24, 1890, a hearing of said contest was had at the St. Cloud land office, at which Knappen appeared in person, and the State of Minnesota by attorney.

On May 13, 1891, the local officers made their joint decision recommending that the State's selection of said tract as swamp-land be held for cancellation, and that Knappen's application to make homestead entry be allowed.

The State of Minnesota appealed to your office.

On May 6, 1892, by letter "K" of that date addressed to the local officers at the Duluth land office, your office dismissed the State's appeal, declared the decision of the local officers at St. Cloud as to the character of said tract of land to be final, and rejected the claim of the State in the premises.

No appeal was taken from said decision.

Appended to said decision was a paragraph in the following words: "The application of Knappen is returned herewith, and no valid objection being found to subsist, you will allow him to perfect the same;" which were irrelevant and misleading.

On May 19, 1892, Holman filed at the Duluth land office his application to make homestead entry of said tract of land, which was on May 20, 1892, rejected by an order of the local officers in the following words: "Rejected for conflict with prior application of Theo. F. Knappen; see Commissioner's letter K, May 6, 1892."

On June 15, 1892, Holman appealed. But his appeal was not forwarded to your office until July 28, 1892.

In the meantime, on June 29, 1892, Knappen appeared at the land office in Duluth, and filed his application to make homestead entry of said tract in conformity with sections 2289 and 2290 of the Revised Statutes, as amended by the act of March 3, 1891, and he was allowed to make such entry, the local officers writing on the face of his application and on the face of his duplicate receipts the words: "Allowed by Commissioner's letter K, May 6, 1892."

On September 27, 1892, your office, on consideration of Holman's appeal, affirmed the decision of the local officers at Duluth, rejecting Holman's application.

On October 29, 1892, Holman filed in the local office his appeal to this Department. And at the same time, he filed his affidavit of contest against Knappen's entry, duly and impressively corroborated, in which among other things, he alleged circumstantially and in substance:

That Knappen is an attorney-at-law, residing and practicing his profession at Minneapolis; that his application to make homestead entry of said tract of land was fraudulent, a sham and pretence only; that he never intended to establish a residence thereon, or to adopt the occupation of a farmer in place of his present profession; that he had colluded and combined with a clerk in the land office at St. Cloud and other persons, with intent to scrip the land or otherwise to secure title from the government, and to divide among them the proceeds of the speculation. And he prayed that a hearing be ordered that he may prove said allegations, etc.

Instead of ordering a hearing, the local officers, on November 9, 1892, forwarded said affidavit of contest to your office, attached to Holman's appeal, and your office transmitted it to this Department, with your letter "C" of December 5, 1892.

While Holman's appeal was pending here, and his prayer for a hearing of his contest against Knappen's entry was under consideration, on December 27, 1892, Knappen filed in the land office at Duluth, his original duplicate receipt of June 29, 1892, with a relinquishment to the United States of all his right, title and interest in said land, endorsed thereon, and subscribed and sworn to by him, on the 22d day of December, 1892, before a notary public in Hennepin county, Minnesota.

And thereupon, on said December 27, 1892, Knappen's entry was canceled; and one Stillman Reed filed his application to make home-

stead entry of said land; which application was, on December 31, 1892, transmitted by the local officers without action, to your office for consideration and direction. Your office transmitted the same with other papers belonging to the case, to this Department with your office letter "C" of February 9, 1893.

Your office decision of September 27, 1892, holding that the local officers were correct in rejecting Holman's application to make homestead entry, was erroneous. It ought to have been received subject to Knappen's preference right as contestant against the State of Minnesota. (16 L. D., 334, 15 L. D., 424, 1 L. D., 162, 2 L. D., 321). When Knappen exercised said preference right and made entry on June 29, 1892, Holman's application became of no effect; and it might properly have been rejected then.

When Holman, on October 29, 1892, filed his affidavit of contest against Knappen's entry, it should have been entertained by the local officers, and a time for hearing should have been set. That contest must be considered as pending. When Knappen on December 27, 1892, filed his relinquishment to the United States, Holman, as successful contestant, became entitled to his preference right, and had precedence of Stillman Reed's application.

Your office will, therefore, direct that the application of Stillman Reed be rejected; that the cancellation of Knappen's entry on December 27, 1892, stand approved; and that Holman's application to make homestead entry of the tract of land aforesaid, be allowed; subject, as in other cases, to contest, and to any legal objections that may appear.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATE.

FREDERICK ROSE.

A soldier's additional homestead entry made by an attorney in fact, and based on a certification of the additional right, and regularly allowed under the regulations then existing, exhausts the additional right of the soldier.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894.

(P. J. C.)

Counsel for Frederick Rose presented you a petition dated March 23, 1889, asking for the restoration of Frederick Rose's additional homestead right, alleging that he made final entry of eighty acres at Boonville, Missouri, August 30, 1872; that by virtue of his military service he is entitled to make an additional entry of eighty acres;

That on March 12, 1879, he made a soldier's additional homestead entry, numbered 2799, final certificate numbered 1641 for the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 29, Tp. 42, R. 27 in Taylors Falls, Minn., district;

That on May 27, 1879, said entry was canceled because it was within the Mille Lac Indian Reservation; that on October 25, 1880, a certificate of right to make a new location was prepared, "but is now preserved in the possession of the General Land Office;" that on August 15, 1882, "without your petitioner's request, knowledge or consent his said entry" was re-instated on the records of the General Land Office that a patent has not issued, "nor has he ever enjoyed any benefits from said entry;"

That by act of Congress approved July 4, 1884, (23 Stats., 89) it is expressly provided that said land "shall not be patented or disposed of in any manner until further legislation by Congress."

Such legislation has not yet been had.

In view of these facts, it being manifestly inequitable and unjust to require your petitioner any longer to await the action of Congress in this matter, and for a still longer period remain without the enjoyment of the benefits of the right conferred upon him by said section 2306 R. S. U. S., your petitioner prays that said entry numbered 2799 in Taylor's Falls district may be finally canceled and the said certificate, heretofore mentioned, be issued to him, or if more fully in accord with the practice in vogue in your office, that his soldier's additional right may be restored to him without prejudice.

Subsequently Rose filed a relinquishment of said entry, dated April 22, 1889, accompanied by an affidavit, in which he swears "that he has received no certificate for the soldier's additional homestead entry" described above, and that the "entry was made without his knowledge, authority or consent;" and under date of September 9, 1889, he filed the following affidavit—

Frederick Rose, being first duly sworn, deposes and says—That he did not sign any papers before W. T. Shafer, deputy clerk under William C. Evans, clerk of the Crawford county circuit court, Steelville, Missouri, on April 5th, 1879, for the purpose of making soldier's additional homestead, and that he never gave at any time power of attorney to T. B. Walker to act in such matter, and that he has in no manner, either by entry, application, or by sale, transfer, or power of attorney, exercised his additional right of soldier's homestead entry.

By an affidavit filed September 30, 1891, sworn to by the President of the Mississippi River Logging Company, it is shown that said company purchased for a valuable consideration the lands covered by Rose's entry" and that it is the owner of the same.

By letter of October 22, 1891, you rejected Rose's petition, and decided that the entry made in his name is confirmed by virtue of the proviso of Sec. 7 of the act of March 3, 1891. The matter is now before me on the appeal of the petitioner, and he assigns as error—

1. In holding that the local officers had not, (and by implication the Commissioner has not now) any means of determining whether the homestead application and other papers filed in the name of Rose were actually executed by him or filed by his authority.

The other assignments of error are addressed entirely to your judgment that the entry was confirmed under said act of Congress.

It seems to me that there is but one question presented here for consideration, and that is as to whether or not Rose is entitled to the res-

toration of his soldier's additional right, and if it is found that he has already exercised it, then it necessarily follows that he cannot be permitted to use it again. It will be observed that Rose's statements in regard to this matter are contradictory, but without discussing them in detail, I may say that I think his petition should not be allowed. An examination of the papers show that the entry was regularly made under the regulations that existed at the time (*Wachter et al. v. Sutherland*, 7 L. D., 165). All the papers bear his signature, unmistakably the same signature all the way through, and the applicant will not be heard now to deny their execution under such circumstances. It is true the power of attorney that should accompany the application is not in the files, but inasmuch as all the record shows that the entry was made by the attorney in fact, it will be presumed that the land officers had sufficient evidence before them to satisfy them of his appointment.

The position is therefore dismissed, but nothing herein is to be construed as confirming said entry.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

OKLAHOMA LANDS—HOMESTEAD CONTEST.

LAUGHLIN *v.* MARTIN ET AL.

One who knowingly enters the Territory of Oklahoma, prior to the hour fixed for opening the lands therein to settlement and entry, becomes thereby disqualified as a homesteader.

Presence within the Territory during the greater part of the period from March 2, 1889, to the hour fixed for opening, disqualifies the person so present as a homesteader, unless it appears that he was lawfully within the Territory.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894.

(E. M. R.)

This case involves the NW. $\frac{1}{4}$ of Sec. 11, T. 17 N., R. 1 W., Guthrie land district, Oklahoma Territory.

The record shows that Samuel D. Martin made homestead entry for this tract on April 26, 1889, and that on May 24, 1889, M. M. Laughlin filed an affidavit of contest against said entry, alleging that S. D. Martin was disqualified to make entry, on the ground that he had violated the act and the proclamation of the President in opening the Oklahoma lands to settlement under the homestead laws, by entering the lands of the Territory between the 2d day of March, and the hour of noon of the 22d day of April, 1889; and further, that he, the said M. M. Laughlin, was the prior settler upon the said tract, and had made the first improvements upon the land, in compliance with the settlement laws.

Subsequently, on July 9th, following, Laughlin made application to enter the tract in controversy under the homestead laws, which was rejected for conflict with the entry of Martin. January 30, 1890, Rhoda A. Hines filed an affidavit of contest, alleging that both Martin and Laughlin were disqualified from making entries in the Territory, as they both had entered said Territory, in violation of the act of Congress and the President's proclamation, as set out in the affidavit of contest filed by Laughlin against Martin.

May 20, 1890, the register and receiver issued notices to the various parties to the suit, citing them to appear at the local office on July 19, 1890, in order that their rights might be passed upon and adjudicated. After continuance, the case came up for hearing October 15, 1890.

March 16, 1891, the register and receiver rendered their joint decision, dismissing the contest of Laughlin, and recommending for cancellation the entry of Martin. May 9, 1891, Laughlin and Martin both appealed from the decision, alleging it to be contrary to the law and the evidence.

April 9, 1892, your office decision reversed the finding below, and dismissed the contests of Laughlin and Hines, and allowed the entry of Martin to stand.

May 19, 1892, Laughlin appealed, alleging the decision to be contrary to the law and the evidence, and on June 11, 1892, Rhoda A. Hines also appealed, making the same allegations.

The evidence is voluminous, and conflicting beyond reconciliation, but the following facts are well established.

On Sunday, April 21, 1889, Samuel D. Martin and party, consisting of his father, Samuel B. Martin, his brother, George C. Martin, the brother-in-law of his father, W. C. McCormick, and a man by the name of E. Ulm, were approaching the Oklahoma line. They were travelling in two wagons. Samuel D. Martin, Samuel B. Martin and E. Ulm were in the front wagon, and George C. Martin and W. C. McCormick, in the other. They reached the line at about three o'clock in the afternoon, and crossed it, continuing south, as the defendant Martin claims, in ignorance. Prior to reaching the line, they claimed that a soldier told them that they would be stopped by the officers when they reached the line, and it was due, they asserted, to this statement, that they crossed the line, and entered the Territory of Oklahoma.

It is a well settled holding of this Department, of uniform application, that the contestant must prove his case, and the burden of proof consequently rests upon him. Here the question at issue primarily, is the allegation of Martin's entry into the Territory during the prohibited period, and when the fact was established, a prima facie case was made for the contestant, and the burden of proof, in contemplation of law, shifted to the defendant to explain his presence not to be in contravention of the spirit of the law. It then became his duty to show that his entry and presence, though violating the letter of the law, was not inharmonious with its spirit and purpose, and the burden of proof,

in establishing the innocence and inadvertence of his presence, rests as heavily upon him as it did upon the contestant in the first instance.

Such being the law upon the issue now under consideration, it becomes necessary to examine the evidence adduced in regard to the circumstances surrounding Martin's entrance of the Territory on the 21st of April.

It appears that when he and his party reached the line, at the time before mentioned, quite a crowd was there assembled, and though one of his witnesses, George C. Martin, his brother, says that there were only about a dozen people present, on cross-examination he would not swear that there were not a hundred. The men in the crowd were cooking, eating and walking around. When they reached the line, it is shown by the testimony offered in Martin's behalf, that a man rode up to George Martin and McCormick and said, "Did you know you were on the line?" George Martin replied that he did not know where the line was. McCormick asked if they had not better stop, to which Martin answered that the man who had just spoken, knew no more about the line than they did themselves. McCormick got out; George Martin followed the wagon of Samuel D. Martin, the defendant, into the Territory.

McCormick testifies that he tried to get his horse, which was hitched to the wagon, and whilst George Martin denies this, it would appear that it is only reasonable that he did make such demand, as he had no other means of making the race from the line. Though McCormick was the brother-in-law of Samuel D. Martin, when the latter saw him out of the wagon, he did not undertake to ascertain why he got out, but supposed it was because he was angry, and yet saw no evidence of his being angry.

It is in evidence that none of the party knew where the line was, and yet when they came to this crowd, they made no inquiries, but continued on south into Oklahoma, relying, as they state, upon the statement made to them by the soldier. It is incomprehensible that men who were seeking to conform to the law, should have taken no more precaution not to violate it, and the burden of proof being upon Samuel D. Martin to show the inadvertence of his crossing the line, it is evident that he has failed. On the contrary, it is equally evident that he crossed the line knowingly. He was about seven miles in Oklahoma before he discovered, he alleges, that he had crossed the line. He did not turn back, as would naturally have occurred to one who found that he had violated the law, but continued on south, and crossed the Cimarron River, where he camped that night, outside of the Territory. When it is borne in mind that he was fifteen miles nearer the land now in question, after crossing the southern boundary, a motive is at once shown why the trip across this neck of Oklahoma was made, and when it is considered that, though there is nothing contained in the evidence that indicates that Martin had any particular tract in view, that nevertheless the land in issue was only one and a half miles distant from the

east line of the Territory, and was Cimarron River bottom lands, which were amongst the best lands in the Territory, his strange conduct in failing to make inquiries as to where the line was, and his continuing on south, instead of turning back when he ascertained, as he alleges, that he was in Oklahoma, discloses his probable object to have been an intention to acquire land in that desirable region.

In the case at bar, the defendant, Martin, knowingly crossed the Territory, and under the spirit of the law, as set forth by the act of Congress, and the President's proclamation and the construction placed upon them by the case of *Smith v. Townsend* (148 U. S., 490), and the recent decision of this Department in *Turner v. Cartwright* (17 L. D., 414) his entry, as set out in the testimony, disqualifies him as an entryman in the Territory.

The cases of *Donnel v. Kittrell* (15 L. D., 580), and *Golden v. Cole Heirs* (16 L. D., 375), are not in point, as in those cases the entries were unintentional.

It is therefore now held that one who entered the Territory prior to the hour of opening, knowingly—as did Martin in this case—became by such entry, disqualified as a homesteader.

Such being the law applicable to Martin, it now becomes necessary to examine Laughlin's qualifications. The evidence shows that for a period of nearly seven years he had been employed in herding cattle in the Iowa Nation and the Oklahoma Territory, and that he was well acquainted with the land in this township. He was camped within a quarter of a mile of the land in controversy, upon one occasion, during his stay in the Territory from March 2d until April 21, 1889, and it is claimed that he was well acquainted with the land prior to the period at which it was prohibited to enter the Territory, and therefore that his presence within the Territory from March 2d to April 21st, 1889, gave him no advantage.

The presence of one during nearly the whole prohibited period, in the Territory, when the evidence shows that he camped once within a very short distance of the land, ought not to be held to leave one any legal rights as a settler. It would open the way to fraud and imposition upon the government.

If one desired to enter the Territory as a homesteader, he should have gone outside at the commencement of the period during which it was unlawful for one to remain in the Territory.

The facts in Laughlin's case are not similar to those in the case of one who, by chance, enters or was inside and so remained, until just before the hour of opening, but whose subsequent homestead claim is so far removed and disconnected from his location while in the Territory as to destroy and negative any idea of advantage gained by such presence and entry.

It is therefore held that one who is within the Territory from March 2, up to April 21, 1889, is disqualified to secure title to lands therein, unless it appears that he was lawfully within the Territory.

Martin and Laughlin both made substantial improvements upon the land, but your office was in error in holding that Laughlin offered no evidence of prior settlement upon the land. On the contrary, the evidence clearly shows that he did this, though under the conclusion herein reached, it is immaterial. And the evidence further contains much testimony to show that Martin entered the Territory again upon the 22d, prior to the hour of noon, but owing to the conclusion of law reached upon the effect of his admitted entry of the Territory on Sunday, April 21st, it becomes unnecessary to determine whether he again violated the law on April 22, 1889.

Martin and Laughlin being thus held to be disqualified as homesteaders in Oklahoma, it follows that the preference right to enter the tract in issue, will be given the second contestant, Rhoda Hines, and in this connection it is well to note that there is some evidence in the testimony, though not directly brought out, that may, perhaps, indicate that collusion existed between the first and second contestants, Laughlin and Hines, but it is not in such a shape, or sufficiently strong now, to warrant any conclusion thereon.

It is in conclusion, therefore, held that the entry of Martin will be canceled, and as Laughlin has equally violated the law, the second contestant, Hines, will be allowed to make entry for the land, and your office decision is accordingly reversed.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

HOMESTEAD ENTRY—MARRIED WOMAN.

JANE MANN.

A husband and wife, while living together in such relation, can not each maintain a homestead entry at the same time.

Where a woman, having an unperfected homestead entry, marries a man having a similar claim, the parties should elect which of the two claims they will maintain, as both entries can not be carried to patent.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894.
(H. F. S.)

Mrs. Jane Mann formerly Jane Kinnaird has appealed from your decision of February 3, 1892, holding for cancellation her homestead entry for the NW. $\frac{1}{4}$ of Sec. 23, T. 119 N., R. 57 W., Watertown, South Dakota.

It appears that she made said entry March 26, 1885, and claims to have established residence thereon about September 1, following, and has continued said residence up to the present time making valuable improvements thereon, estimated as worth about \$900, and that on May 22, 1887, she married Joseph Mann, who on August 9, 1886, had

also made a homestead entry for the SE $\frac{1}{4}$ of Sec. 32, same town and range.

November 3, 1887, a little over five months after his marriage, Mann made final proof and commuted his homestead to a cash entry which was approved and patented July 15, 1890. On July 14, 1891, his wife made proof on her homestead entry, the local officers issued the final papers and the case was duly transmitted to you for examination and approval.

Under date of February 23, 1892, you held that a husband and wife living as one family can not maintain entries at the same time and therefore held Mrs. Mann's entry for cancellation.

March 9, 1892, the local officers transmitted the application of Mrs. Mann asking for a reconsideration of your decision which, on March 30, 1892, you denied, whereupon she appeals.

This Department has repeatedly held that an entrywoman loses no right acquired under the homestead law, simply by her marriage provided that after marriage, as before, she continues to comply with the law. Alice M. Gardner (7 L. D., 470); Angie L. Williamson (10 L. D., 30); Hanson *v.* Earl (13 L. D., 548).

In none of the foregoing cases, however, does it appear that the husband and wife were both trying at the same time to secure an entry under the settlement laws.

In the case at bar, Mann and his wife attempted to maintain residence for over five months in two houses about three miles apart and afterwards, he having commuted his entry, for over three years and eight months they resided together in one house upon the wife's homestead entry.

The principle laid down in the case of Bullard *v.* Sullivan (11 L. D., 22) must govern in this case. It was held therein that a husband and wife while they live together as such, can have but one residence and the home of the wife is presumptively with her husband. The claim of Mrs. Mann that she never resided with her husband upon his entry, in fact that she refused to do so, does not affect the case. The fact still remains that they were legally man and wife and were seeking to obtain title to two homestead entries at the same time.

When the claimant married a man who had made a homestead entry upon which final proof had not been perfected, it remained for them to elect which of the two homesteads they would retain and prove up on as their home as they were not allowed to hold both, (Hattie E. Walker, 15 L. D., 377) but it appears that Mann continued residence upon his entry and patent has issued therefor, hence under the rule laid down in the case of Wm. A. Parker (13 L. D., 734), Mrs. Mann's entry should be canceled. Your decision is affirmed.

Approved,

JOHN I. HALL,

Assistant Attorney General.

TIMBER CULTURE CONTEST—MARRIED WOMAN.

AUSTIN v. ROBBINS.

Failure to break the second five acres within the statutory period does not call for cancellation of the entry where said failure is solely due to the continued ill health of the claimant, and good faith is clearly manifest.

In case of an attack upon a timber culture entry held by a married woman, the wife can not be regarded as responsible for the failure of her husband to assist her in conforming to the requirements of the law.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (G. B. G.)

March 15, 1889, Ada Elwood made timber culture entry No. 13220, for the NW. $\frac{1}{4}$ of Sec. 33, T. 118 N., R. 55 W., of the Waterton land district, South Dakota.

April 24, 1891, Emmet M. Austin filed his corroborated affidavit of contest, alleging that

the said Ada Elwood [Robbins] failed to plow or break, or cause to be plowed or broken, five acres of said tract during the first year after entry, and that said claimant failed to plow or break, or cause to be plowed or broken five acres of said tract during the second year after entry, and that said claimant failed to cultivate to crop or otherwise five acres of said tract during the second year after entry, and that said failure still exists.

June 4, 1891, the parties appeared and submitted testimony, and on August 28, 1891, the register and receiver rendered their joint decision, dismissing the contest, but expressing some doubt as to the correctness of their conclusion.

Appeal was had, and on June 16, 1892, your office affirmed the finding of the local officers, holding that

the plaintiff has failed to sustain his (contestant's) sweeping charges; the only failure to comply with the law was during the second year of entry, and that failure was as to the second five acres; it is shown that the claimant herself was sick and unable to perform the work herself, or to oversee that the work was done; her husband was obliged to be with her nearly all the time; they resided about four miles from the tract, and the husband was unwilling to leave the claimant alone for the time it would take him to do this breaking.

On appeal to the Department, contestant assigns five errors, all of which are substantially embraced in the third specification, which submits that your office erred "In holding that an absolute failure to break a second five acres during the second year of entry, does not necessitate the forfeiture of the entry involved," and this is the only issue before the Department for adjudication.

Under this general issue, the first question that addresses itself is one of law.

Does an absolute failure to break any part of the five acres, as required of a timber culture entryman during the second year after entry, admit of any excuse or palliation?

Authorities are numerous wherein it has been held that where the number of acres cultivated, or trees planted, is slightly less than that specified in the statute, such shortage will be excused if good faith is apparent. See *Griffin v. Forsyth* (13 L. D., 254), and cases there cited, and it has been held that where the entryman prematurely planted the required number of trees, that his entry would not be held for cancellation because he had not observed the literal wording of the statute. *Swall v. Loeb* (15 L. D., 591).

In the timber culture contest case of *Andrews v. Cory* (7 L. D., 89), it is held that

where the rights of a third party are not involved, the government does not usually insist on such a forfeiture, unless bad faith is shown on the part of the entryman, or such gross carelessness and utter indifference to legal requirements as would clearly warrant the inference of a want of good faith.

In this case it was shown that the five acres on which the first planting of tree seeds was done had not been properly prepared for such planting, and the crop was almost an entire failure; the five acres was not replanted and no excuse given why it was not done.

In the case at bar, it is shown conclusively, and not seriously denied, that prior to the initiation of contest herein, claimant had one hundred acres fenced in for a pasture, and five and one-half acres of breaking, which was sown to flax in 1890. It is abundantly proven that claimant was seriously ill from November, 1889, to November, 1890, and that in the spring of 1890, her husband had to give her his constant care, that hired help of the character to relieve her husband from this duty, was not available, and it is in proof by four witnesses that both the claimant and her husband did all apparently in their power to get five acres more broken during the second year.

It appears further, that in the fall of 1890, an attempt was made to break this land, but it was an old lake bed, and so hard that nothing could be done with it. It further appears that in the following spring, after the initiation of contest herein, claimant had five acres broken, and the whole ten acres put to crop. This is not material, except as a development along the line of original intention, and as evidence of good faith.

There is no allegation or proof of poverty in this case, and it appears from the evidence that the necessary breaking could have been done in three days, and that claimant's husband had a good team, and it is strenuously insisted by counsel for appellant, that even if the default of the entryman may be excused on the ground of apparent good faith, that claimant's husband had ample means at his command, and reasonable opportunity to do this work, or have it done. This contention would appear reasonable enough, assuming that husband and wife are in all things one, and that a legal obligation rests on each to look after the affairs of the other, but this would be a violent assumption, and I know of no general principle of law applicable to the issue, that would

divest the wife of property rights through the default or misdoing of the husband, and there is nothing in the timber culture laws that would hold the wife responsible for the failure of the husband to assist her in conforming to the requirements of the law, any more than if an entire stranger had refused or neglected to do so.

In the case of *Abbott v. Willard* (13 L. D., 459), it is held that "a timber culture contestant, who alleges and proves a substantial failure on the part of the entryman to comply with any of the statutory requirements, is entitled to a judgment as against the entire entry." In that case, the default was attempted to be excused on the ground that "cultivation was unadvisable by reason of drouth during said year." This it appears, was not only "not satisfactorily established," but is very different from the case at bar, in that claimant took his risks on non-compliance with the law, knowingly and willfully, while in this case, a strict compliance with the letter of the law was rendered impossible by the act of God.

There is every evidence of good faith. The equities of the case are all with the claimant, and the judgment of your office is hereby approved and affirmed.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

RAILROAD GRANT—TERMINAL LIMIT—WITHDRAWAL.

FALLS v. ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The withdrawal of June 3, 1869, on account of the main line of the St. Paul, Minneapolis and Manitoba Ry. Co. did not extend north of a line drawn due east from Breckinridge, and a pre-emption filing after such date for lands in the indemnity limits on said main line, north of said easterly line, was properly allowed, and being of record and unexpired at the date of the definite location of the St. Vincent Extension of said road, served to except the lands covered thereby from the grant made on account of said extension.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (F. W. C.)

I have considered the case of *John A. Falls v. St. Paul, Minneapolis and Manitoba Railway Company*, involving the SE. $\frac{1}{4}$, Sec. 13, T. 134 N., R. 45 W., St. Cloud, Minnesota, on appeal by Falls from your office decision of November 7, 1889, sustaining the rejection of his application presented for said land for conflict with the grant for said company upon its branch (St. Vincent Extension) line.

This tract was reported to be within the limits of the withdrawal for indemnity purposes upon the main line of said road, the order for which was received at the local office June 3, 1869; also within the primary limits upon the St. Vincent Extension, the location of which was made

December 19, 1871, and within the second indemnity belt under the grant for the Northern Pacific Railroad Company.

I find upon inquiry at your office that this tract was not embraced within the limits of the withdrawals made upon the maps filed showing the general route of said Northern Pacific Railroad, and not having been selected by said company, a consideration of any claimed rights under said grant is unnecessary.

It is also found that this land lies north of a line drawn due east from Breckenridge, which is the terminus of the main line of the Manitoba road.

On June 23, 1871, Brant Oleson filed pre-emption declaratory statement No. 753 for this land, alleging settlement the same day, which filing was of record at the date of the definite location of the St. Vincent Extension on December 19, 1871. The decision appealed from holds said filing to be illegal because of the previous withdrawal of 1869 on account of the main line.

In the matter of the withdrawal of 1869, your office decision of May 13, 1891, in the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Edwin Allen and L. A. Hagen, involving a portion of the section now in question, contains the following:

May 10, 1869, a map was filed showing the line of the road between the west line of range 41 and the western terminus of the line, at Breckenridge. May 25, 1869, letters were forwarded to the district land offices, enclosing diagrams showing the primary and indemnity limits of the grant along said portion of the road and ordering a withdrawal of lands embraced therein. The letter and diagram addressed to Alexandria, Minnesota, were received June 3, 1869.

The terminal limit of the grant was indicated upon said diagram by a line running due east from Breckenridge, along the south line of the north tier of sections, across townships 132 N., of ranges 47, 46, 45 and 44 W., and the diagram in use at this office at that time showed the terminal limit as indicated by the diagram forwarded to the district land office. At some time, when is not known, the diagram in this office was changed, the due east and west terminal limit being erased therefrom and a new terminal limit line being placed thereon beginning at Breckenridge and running in a northeasterly direction across ranges 47, 46 and 45 W., and diagonally through townships 133 and 134 N., and the several lateral limit lines were extended above the original terminal so as to connect with the new terminal limit line. Correspondence with the district land officers indicates that notice of this change in the diagram was never given to the local land office, and that no order of withdrawal affecting the lands embraced in the triangle formed by the original and new terminal and the exterior lateral limit lines, was ever received at the local land office, and, after a careful examination of the records of correspondence in this office, no evidence is discovered to indicate that a withdrawal of the lands within said triangle was ever ordered, on account of said main line grant.

In said case your office held that this section was never included in the withdrawal of 1869, and was therefore subject to the filing of one Olson Kerkernd, made in June, 1871, which filing was held to defeat the grant on account of the St. Vincent Extension line.

On appeal by the company, the decision in that case was affirmed April 17, 1893 (Vol. 265 L. and R., page 475), not reported.

Your office decision in the present case must therefore be held to be

error in so far as it held the land in question to have been included in the limits of the withdrawal of 1869 upon the location of the main line of said road.

This being so, the filing by Oleson was properly allowed, and being a subsisting claim on December 19, 1871, served to except the land from the grant on account of the St. Vincent Extension. *Malone v. Union Pacific Railway Company*, 7 L. D., 13.

The company listed this land on February 2, 1882, on account of the St. Vincent Extension, but, as the land was excepted from that grant, such listing should be canceled, and the land held subject to entry as other public lands.

Said decision recites the facts relative to the applications by Anton A. Kirkely, Andrew O. Ames and John A. Falls to enter the land in question, but, as it held in favor of the company, the respective rights of the parties were not considered.

Having found that the land was excepted from the grant, said decision is reversed and the case remanded for a consideration of the rights of the several applicants.

Approved,

JOHN I. HALL,
Assistant Attorney General.

OKLAHOMA-CHEROKEE OUTLET-TOWNSITE ENTRY.

INSTRUCTIONS.

Probate judges are not invested with power to make townsite entries within the Cherokee Outlet. The provisions of the act of May 14, 1890, made applicable to said lands by the joint resolution of September 1, 1893, require the disposition of such entries through the means of townsite boards.

Secretary Smith to the Commissioner of the General Land Office, February 14, 1894. (F. W. C.)

I am in receipt of your letter of January 26, 1894, presenting for my consideration the question as to whether, under existing laws, probate judges are invested with jurisdiction to make townsite entries in that portion of Oklahoma formerly known as the Cherokee Outlet.

The tenth section of the act of Congress approved March 3, 1893 (27 Stat., 642), provides for the opening of the lands embraced in the country before described, and therein it was provided specifically, that the same should be subject to the second proviso of section seventeen of the act of Congress approved March 3, 1891 (26 Stat., 1026). Said proviso reads as follows:

Provided, That in addition to the jurisdiction granted to the probate courts and the judges thereof in Oklahoma Territory by legislative enactments which enactments are hereby ratified, the probate judges of said Territory are hereby granted such jurisdiction in town site matters and under such regulations as are provided by the laws of the State of Kansas.

There can be no question that under the legislation embodied in the tenth section of the act of March 3, 1893, *supra*, probate judges within the Cherokee Outlet were invested with jurisdiction in the matter of making townsite entries.

By the joint resolution approved September 1, 1893, however, it was provided—

That all the provisions of an act of Congress, approved May fourteenth, one thousand eight hundred and ninety, which provides for townsite entries of lands in a portion of what is known as "Oklahoma," be, and the same are hereby, made applicable to the territory known as the "Cherokee Outlet," and now a part of the Territory of Oklahoma; and that all acts or parts of acts inconsistent with this joint resolution be and the same are hereby repealed.

The question therefore presented is whether the legislation embodied in the resolution repeals that contained in the act of March 3, 1893 (*supra*), in so far as jurisdiction had been thereby conferred upon probate judges to make townsite entries in the Cherokee Outlet.

Under section 2387 Revised Statutes, providing for the making of townsite entries on public lands, the probate judges, or judges of the county courts, when executing the trust imposed upon them in the matter of making townsite entries, proceed under such regulations as may be prescribed under the legislative authority of the State or Territory in which the same may be situated; thus, in the present instance, the probate judges, if making townsite entries within the Cherokee Outlet, would be subject to such regulations as might be prescribed by the legislative authority of the Territory of Oklahoma.

The plan of disposal provided for in the act of May 14, 1890 (26 Stat., 109), places the discharge of the trust in trustees, under such regulations as may be prescribed by the Secretary of the Interior. The whole matter of the disposition of the lands within townsites, through the intervention of townsite trustees, is therefore under the jurisdiction and control, by regulations, of the Secretary of the Interior. This means of disposition is inconsistent with that provided for where the lands are entered by probate judges, and in some cases, were both recognized, it might result in a conflict of authority. It seems to me, therefore, that the purpose of Congress in passing the joint resolution of September 1, 1893 (*supra*), extending the provisions of the act of May 14, 1890, to the Cherokee Outlet, was to supersede any other mode of entry which might have been provided for in previous legislation relating to townsites established on these lands.

I am therefore of the opinion that probate judges are not invested with power to make townsite entries within the Cherokee Outlet, but that all such entries can be disposed of only by and through the means of townsite boards, as provided for in the said act of May 14, 1890.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

SCHOOL GRANT—INDEMNITY SELECTIONS.

STATE OF NEBRASKA.

The grant of school lands to the State of Nebraska included lands within that part of the Great Sioux reservation added to said State by the act of March 28, 1882, subject to the right of Indian occupancy; and, such right having been extinguished under the provisions of the act of March 2, 1889, the State is entitled to select school indemnity within the limits of such reservation in said State for losses sustained therein.

Secretary Smith to the Commissioner of the General Land Office, February 12, 1894. (G. B. G.)

I have considered the case of The State of Nebraska, on appeal from the decision of your office, of August 29, 1892, denying to said State certain lands selected as school indemnity lands in said State, within the limits of the Great Sioux reservation, on account of losses occurring in the same reservation.

A history of the title to these lands is necessary in determining the right of the State to make said selections.

March 12, 1858, (12 Stat., 997) by treaty between the United States and the Ponca Indians, said tribe ceded to the United States all its lands, except a certain specific tract described by metes and bounds, in the first articles of said treaty; and under article two of the same treaty, in consideration of the tribal cession and relinquishment aforesaid, the United States government agreed and stipulated "To protect the Poncas in the possession of the tract of land reserved for their future homes, and their persons and property therein, during good behavior."

March 16, 1865 (14 Stat., 675), seven years later, the Poncas relinquished to the United States about 30,000 acres in the north-western part of the reservation of March 12, 1858, and received in exchange other lands, which other lands were situated in what afterwards became known as the Great Sioux reservation, and were known as Ponca lands up to the passage of the act of March 2, 1889 (25 Stat., 888), throwing open a large portion of these lands to settlement and entry. Under the provisions of said act last above named, (Section 13), each member of the Ponca tribe of Indians, who was at that time occupying a part of the old Ponca reservation, was entitled to certain allotments of land in severalty upon said old Ponca reservation. Said act further provided that when said allotments had been made according to the provisions of the act, upon that portion of said reservation, within the limits of the territory added to the State of Nebraska, by the act of March 28, 1882, extending the northern boundary of said State, the President should then, in pursuance of the further provisions of said act (Section 13), declare the title of the Indians to be extinguished to all lands described in said act of March 28, 1882, and that thereupon,

all of said lands not so allotted and included in said act of March 28, 1882, should be opened to settlement, and the act of March 2, 1889, further provided

that all the lands in the Great Sioux reservation, outside of the separate reservations herein described, are hereby restored to the public domain, and shall be disposed of by the United States under the provisions of the homestead law.

Section 22, of said act provides for the disposition of the proceeds from the sale of these lands, declaring that such proceeds shall be set aside as a permanent fund of the Indians, after first having reimbursed the United States for expenses incurred in carrying the act into effect.

So much for the Indians' title to these lands.

The statutes bearing on the title of the State to these lands, or rather bearing on the right to select the same as school indemnity lands, by no means conflict, as will be seen hereafter, with the statutes hereinbefore referred to, and indeed, in following the lines of title, some of the statutes will be found the same in both.

I premise in the first place, that the Territory of Dakota was organized by the act of March 2, 1861 (12 Stat., 239). Section 14 of this act provides

That when the land in said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory, shall be, and the same is hereby reserved for the purpose of being applied to schools in the States hereafter to be erected out of the same.

April 19, 1864, (13 Stat., 47) the State of Nebraska was admitted into the Union, by act of that date. Section seven of that act is as follows:

And be it further enacted that sections numbered sixteen and thirty-six in every township, and when such sections have been sold, or otherwise disposed of, by an act of Congress, other lands, equivalent thereto in legal subdivisions, of not less than one quarter section, and as contiguous as may be, shall be, and hereby are, granted to the State for the support of common schools.

At the date of this act, these lands were not in Nebraska, but were in the territory afterwards added to said State, by the act of March 28, 1882 (52 Stat., 35), extending the northern boundary of the State of Nebraska, and under the provisions of the act of March 2, 1889, hereinbefore referred to, throwing these lands open to settlement, it was provided as follows:

And when the Indian title to the lands thus described, shall be extinguished, the jurisdiction over said lands shall be, and hereby is, ceded to the State of Nebraska, and subject to all the conditions and limitations provided for in the act of Congress admitting Nebraska into the Union, and the northern boundary of the State shall be extended to said 43d parallel, as fully and effectually as if said land had been included in the boundaries of said State at the time of its admission into the Union.

The said act of March 2, 1889, opening the Sioux Reservation, heretofore referred to, provides in the 24th section thereof, that sections sixteen and thirty-six of each township of the lands open to settlement under the provisions of said act, shall be reserved for public schools, "As provided by the act organizing the Territory of Dakota", and it

will be observed that said section of the same act further provides, "That the United States shall pay to said Indians, out of any moneys in the Treasury, not otherwise appropriated, the sum of \$1.25 per acre, for all lands reserved under the provisions of this section."

This same section 24 is the point at which the converging lines of thought in this case meet.

Two questions arise:

1st. Did the United States grant sections sixteen and thirty-six of these lands to the State of Nebraska for school purposes? And as subsidiary to this, were lands granted to the State of Nebraska in lieu of land lost in place, by reason of the sections being deficient in area, or having been otherwise disposed of?

2d. Were the lands selected, subject to indemnity selection by the State?

In the annual report of the Commissioner of the General Land Office, for the year 1890, page 243, of said report, I find the following, which appears to be part of a letter written from your office to the Commissioner of Public Lands and Buildings for the State of Nebraska.

In the Ponca Reserve, which formed a part of the Great Sioux reservation, and is included in the country to be taken from Dakota and annexed to Nebraska, there is no grant of the sixteenth and thirty-sixth sections in place to the State of Nebraska, but upon extinguishment of the Indian title, the State will become entitled to school indemnity, and it may then select it in the usual manner.

This is manifestly erroneous, taken as an entirety, for the simple and apparent reason, that if there was no grant of the sixteenth and thirty-sixth sections in place, to the State of Nebraska, there could be no loss to the school grant of Nebraska, by reason of other disposition of these sections, and it follows as a logical consequence, that there could be no grant of indemnity for losses that were never sustained. The right to school lands in place, is the only foundation on which to base a demand of indemnity for losses, and where there is no loss, there can be no indemnity.

Was there a grant of sections sixteen and thirty-six in place, of the territory added to the northern boundary of the State of Nebraska, by the act of March 28, 1882? That there was such a grant, is an irresistible conclusion, from the statutes already cited. By the act organizing the Territory of Dakota, these sections were reserved for school purposes, for the benefit of the States thereafter to be formed from said Territory. By the act admitting Nebraska into the Union, sections sixteen and thirty-six in place, were granted to that State for school purposes, and by the act extending the northern boundary of said State into the Territory of Dakota, and including the Ponca lands, it was provided, as has been seen, that the jurisdiction of said land be transferred to the State of Nebraska, "subject to all the conditions and limitations provided in the act of Congress admitting Nebraska into the Union." So it appears that from the time of the organization of the

Territory of Dakota, in 1861, all subsequent legislation with reference to these lands, has been an unbroken chain in the direction of the ultimate disposition of sections sixteen and thirty-six for school purposes.

Were the lands selected, subject to indemnity selection by the State?

In your office decision herein, of August 29, 1892, your office held that these selected lands

are burdened with a trust in favor of the Indians, from whom they were obtained, and it would be a breach of faith on the part of the government to dispose of them otherwise than by sale, as the law provides.

It is true, that under the treaty of March 12, 1858, (*supra*) the United States agreed to protect the Poncas in the possession of these lands, but the title in fee remained in the government, subject to the Indian right of occupancy. This did not prevent the government from granting the fee, subject to said right of occupancy. See *Beecher v. Wetherby* (95 U. S., 517); *Henry Sherry* (12 L. D., 176). By the terms of the act of March 2, 1889, (*supra*) accepted by the Indians, they surrendered their right of possession to the United States, and the government having previously conveyed the fee in the sixteenth and thirty-sixth sections in bulk, to the State of Nebraska, became the trustee of said State for the right of possession to said lands, thus perfecting the State's title thereto, subject, of course, to losses, by reason of allotments to Indians in severalty, and, so far as the allotments extended, the Indians' right of possession was never relinquished. It is on account of losses under these allotments of sections sixteen and thirty-six, in place, and certain other deficiencies arising from natural causes, that the State seeks indemnity in the selections made. After the allotments in severalty had been made, pursuant to said act of March 2, 1889, in accordance with the further provisions of said act, (section 21) the President declared the Indians' title extinguished, as to the unallotted lands. It is urged as one of the results flowing out of the alleged contemplated breach of faith with the Indians, that inasmuch as these lands were to be opened and disposed of to homestead settlers only, and the proceeds to be set aside to the permanent Indian fund, that their selection by the State of Nebraska as indemnity lands, will deprive the Indians of the proceeds of the sale of the same to that extent. The act throwing open these lands to settlement provides (and it would seem, with reference to this very contingency), that the United States shall pay to said Indians the sum of \$1.25 per acre for all lands reserved under section 24, of the same act, which reserved sections sixteen and thirty-six of each township of the lands open to settlement under that act, for public schools. The fact that these lands are made subject to entry by homestead settlers only, does not make them any the less subject to school indemnity selections.

"It would be illogical and inconsistent to assume that Congress would make the usual grant of school lands in place, . . . but neglect to provide for indemnity where the grant in place should fail."

Oklahoma Territory (14 L. D., 226). And the fact that there may be other lands in the State subject to such selection, is immaterial.

The law gives the State the right to select school indemnity lands for sections sixteen and thirty-six, lost in place, or where one or both are fractional in quantity, from any natural cause and the same quality of land may be selected, and "as contiguous as may be" to the land lost by reason of said deficiencies.

You are therefore instructed to take such steps as may be necessary to carry into effect the views expressed herein, in the adjustment of losses to the State of Nebraska under its school grant.

Approved,

JOHN I. HALL,

Assistant Attorney General.

CREASY v. HAMILTON.

Motion for review of departmental decision of June 15, 1893, 16 L. D., 520, denied by Secretary Smith, February 19, 1894.

OKLAHOMA LANDS—QUALIFICATIONS OF SETTLER.

ROFF v. COPLIN.

One who after March 2, 1889, and prior to noon of April 22, 1889, enters the Territory of Oklahoma for the purpose alone of removing his cattle therefrom, in obedience to an order of the military authorities, is not disqualified thereby as a homesteader.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (P. J. C.)

The land involved in this appeal is the NW. $\frac{1}{4}$ of Sec. 20, T. 6 N., R. 1 W., Oklahoma City, Oklahoma Territory, land district.

The record shows that Josiah Coplin made homestead entry of said tract April 30, 1889. On May 29, 1891, Lillie Roff filed an affidavit of contest against said entry, alleging that claimant was disqualified to enter land in Oklahoma, by reason of violation of the President's proclamation. The parties submitted an agreed statement of facts, by which it is shown that Coplin had several years prior to 1889 been engaged in raising cattle near the boundary line between Oklahoma and the Chickasaw country, and was familiar with all the land in that vicinity; that all owners of cattle were by the military authorities notified prior to March 2, 1889, to take and keep them out of Oklahoma, and that defendant and other cattle owners did take them out immediately after the country was opened to settlement, and removed them south of the Canadian River; that his, and other cattle strayed back into the Oklahoma

country, and that on two occasions, to wit: once "during the month of March," and on April 17, 1889, he went into Oklahoma for the purpose of removing them, and on the last occasion was in the immediate vicinity of the land in question; that he had no permit or authority from any government official to enter Oklahoma "other than the general order of the military officers regarding [requiring] all cattle to be removed therefrom;" that otherwise he is a qualified entryman.

On these facts, the local office decided in favor of the contestant; and on appeal by defendant, your office, by letter of September 30, 1892, reversed their judgment, whereupon contestant prosecutes this appeal.

The land in question is located in the extreme southwest corner of Oklahoma, and as shown on the "Outline Map" of the Territory as originally opened, it is less than a mile from the west line and about a mile and a half from the south line, the Canadian River marking both boundaries.

The thorough knowledge of that vicinity gained by the defendant prior to the inhibition imposed by the President's message, precludes the theory that the defendant went into the territory on these two occasions for the purpose of obtaining knowledge of the land or for any other purpose than that stated. I do not think that his presence there on these two occasions, under the circumstances, should be construed to disqualify him, especially in view of the fact that he was compelled to keep his stock out of the territory.

Your judgment is affirmed.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

SOLDIERS' ADDITIONAL HOMESTEAD—CONFIRMATION.

JOHN W. GREEN ET AL.

A soldier's additional homestead entry regularly made under a certificate of right, and power of attorney, exhausts the additional right of the soldier, and a subsequent exercise of such right is not confirmed by the proviso to section 7, act of March 3, 1891.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (L. L. B.)

By your letter of June 3, 1891, you held for cancellation soldier's additional homestead entry, No. 12,946 (final certificate No. 2472), for the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 12, T. 9 S., R. 53 W., (forty acres) Denver, Colorado, made August 23, 1888.

This entry was made by John W. Green and based upon his original entry of one hundred and twenty acres made January 29, 1866, at the

East Saginaw, Michigan, land office, which was patented September 25, 1891. Your action in holding it for cancellation was because your office, on June 5, 1878, issued to Green a certificate showing that he was entitled to an additional forty acre entry, which, as shown by the records of your office, was located August 10, 1885; by Green on the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 32, T. 19 N., R. 13 E., Sacramento, California (final certificate 2235).

One Charles A. Creel appealed from your said action, and it not appearing that he had any interest in the entry, this Department, by decision of August 12, 1892, remanded the case to be disposed of under rule 82 of practice. Subsequently, he filed evidence showing that he purchased the land from Green immediately after the entry, and the appeal is now properly here.

Both these additional entries are based upon the same original entry and the same military service, and you state in your letter that: "the signatures to the two sets of papers on comparison appear to be identical."

The entryman Green, since your decision was rendered, has filed with the appeal record his own affidavit, corroborated by Mrs. M. J. Green (presumably his wife), stating that this last additional entry was made in good faith and without any knowledge on his part that any certificate had been issued in his name, or entry made thereunder; that he had never made or attempted to make a personal entry of his soldier's additional homestead right prior to August 23, 1888. He further states as follows:

Affiant now recalls that some time prior to the 5th of June, 1878, he executed at Hope, Midland county, Michigan, some papers pertaining to his additional homestead right, in the nature of an application, and two powers of attorney, which were executed in blank, and that he never was informed that a certificate had been issued in his name; not having ever heard from the papers so executed, he presumed that they were void, and that they had been destroyed; he further states that not until the receipt of the notice of the cancellation of the Denver entry, had he any knowledge that a certificate had ever been issued in his name.

That affiant made, or attempted to make, an unconditional sale of his said soldier's additional homestead right, and all of his right, title and interest therein for and in consideration of the sum of \$40, made at Hope, Michigan; that affiant then and there parted with the possession of the papers aforesaid; and any and all papers executed by him purporting to authorize other person or persons to locate the same were executed in blank as to the grantees; that said transfer was made without any reservation whatever in favor of affiant as to any lands that might thereafter be located with said papers, or any benefit whatever that might flow therefrom. Affiant was not informed, and did not know that a certificate could or would issue in his name.

He also says that he was never at the Sacramento, California, land office, nor farther west than Wyoming, and that the entry made in the Sacramento office was not made in his interest.

Thus, by his own admission, he sold his additional homestead right for a moneyed consideration, and signed two powers of attorney (one, probably, to locate his claim, and the other to dispose of it after location); thus placing it in the power of the purchaser by the means of

these papers to procure final certificate and patent for forty acres of government land.

This land has been located and final certificate issued, and upon application and payment of government price for the land, a patent must issue, for by a clause in the sundry civil appropriation act, approved March 3, 1893, it is provided:

That where soldiers' additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder upon making proof of such purchase may perfect his title by payment of the government price for the land.

It is true that, under the rulings of this Department, entries made by the purchaser of a soldier's additional homestead right are declared to be unlawful, but it does not follow that the vendor of such right may reap the benefits of his sale and then plead the illegality of such sale, when he may find it profitable to do so. No man may profit by his own wrong.

Final certificate has issued upon the California entry, and whether such entry was made in conformity with law or in violation of it, it was made through the voluntary act of the claimant herein. It is regular on its face, was made in his name, and if another has reaped the benefit thereof he was enabled to do so through the participation of Green in a transaction he now seeks to avoid upon the ground of illegality. He is in possession of the proceeds arising from the sale of his right; the entry has been made and certificate issued through the authority so conferred by him, and this Department is now asked to cancel the entry so as aforesaid made and allow him to make another entry in his own interest. He is not before the Department with clean hands, and is, I think, estopped by his own act from denying the legality of his California entry.

It is claimed in the appeal that this entry should be confirmed under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095). It can not be confirmed under the body of the act, because Creel's purchase was subsequent to March 1, 1888; it must therefore be treated as if no transfer had been made.

In the instructions issued by Secretary Noble, July 1, 1891, it is said:

In my judgment it was not the intention of the act (March 3, 1891). . . . to confirm all entries after two years from final receipt without regard to their status; nor to confirm entries made without authority of law and which could not have been allowed under the law as it existed at the passage of the act of 1891. (13 L. D., page 3.)

See also *United States v. Smith*, 13 L. D., 533, and *Mee v. Hughart*, id., 484.

Your judgment is affirmed.

Approved,

JOHN I. HALL,

Assistant Attorney General.

UNOFFERED LANDS—SPECIAL ACT.

WILLIAM H. TIBBITS.

A special act of Congress authorizing the location of "one hundred and sixty-acres of any of the public lands subject to private entry" confers no authority to appropriate unoffered lands.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of Sec. 34, T. 4 N., R. 4 W., Oregon City land district, Oregon.

The record shows that on July 1, 1892, William H. Tibbits made homestead entry for the above described tract.

September 1, 1892, the local officers forwarded to your office Tibbits' petition for patent to the land under authority of the act of Congress of August 8, 1888 (25 Stat. 1145). That act is as follows:

Whereas it appears from the records of the General Land Office that W. H. Tibbits did in good faith, on the fourth day of January, eighteen hundred and seventy-two, make homestead entry of the northeast quarter of section twenty-one, township nine north, range eleven east, in the State of Nebraska, and resided thereon for the full period of time required by existing statutes, and improved and cultivated the same: and

Whereas it further appears that the said tract of land was patented to the Burlington and Missouri River Railroad at a time subsequent to said homestead entry, and sold by said railroad company to other parties: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the said W. H. Tibbits, or his legal representatives, is hereby authorized to locate one hundred and sixty acres of any of the public lands, subject to private entry at one dollar and twenty-five cents per acre, of the United States; and patent shall issue to him or his assignees as in other cases of a like nature.

Approved, August 8, 1888.

Your office decision asserts that the land for which petitioner prays patent may issue "never was offered at public sale, and hence was not subject to private entry at the date of said act of August 8, 1888, or at any time since."

The act of Congress quoted was a special, personal act, intended to relieve the petitioner from the hardship therein shown to exist, but the remedy offered was distinctly and clearly set forth: "one hundred and sixty acres of any of the public lands, subject to private entry," etc. The remedy was thus restricted to that class of lands, and as the land entered by the appellant does not come within the relief extended by the act and is not embraced within its meaning, it cannot be asserted as his authority, and he acquires under it no rights to the land now in issue.

Your office decision is accordingly affirmed.

Approved,

JOHN I. HALL,

Assistant Attorney General.

RESERVOIR LANDS—SETTLEMENT RIGHTS.

BOX v. DAMMON ET AL.

One who purposely enters upon the reservoir lands, restored to the public domain by act of June 20, 1890, prior to the time fixed therefor, and goes upon the tract subsequently selected, is thereby disqualified to make homestead entry of said land, though outside of the boundaries when the lands were opened to settlement.

Where settlement and entry are simultaneous the settler will be recognized as having the superior right.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (E. M. R.)

This case involves lots 1, 2, 3 and 4 of Sec. 20, T. 39 N., R. 9 W., Eau Claire land district, Wisconsin.

The record shows that Jeremiah Dammon made homestead entry for the above described tract on December 20, 1890.

December 22, 1890, Francis L. Box and Jessie M. Sinclair presented applications for lots 1, 2 and 3, which were rejected for conflict with the entry of Dammon.

From the action of the local officers Jessie M. Sinclair appealed, and on May 23, 1891, Francis L. Box filed an affidavit of contest, alleging prior settlement on his part on the land, making the same allegations as those of Sinclair in her appeal. A hearing was ordered, and on July 16, 1891, all parties appeared in person and by attorneys, and after the testimony was submitted the register and receiver rendered their decision, wherein they recommended for cancellation the entry of Dammon as to lots 1, 2 and 3, and gave the preference right to enter to the settler Jessie M. Sinclair.

Dammon and Box appealed, and on August 22, 1892, your office decision sustained the finding of the local officers.

From this decision Dammon and Box again appealed, alleging in substance, that the same was against the law and the evidence, and in contravention thereof.

The evidence shows that on December 20, 1890, Jeremiah Dammon was at the land office at the hour of making entry, at 9 a. m.; that when the doors were thrown open he was the first man to enter, but found two policemen, who had been allowed to enter in order to preserve the peace, at the desk seeking to make entry. Their applications were rejected and Dammon was allowed to make entry.

The settlers Francis L. Box and Jessie M. Sinclair, were under the impression that the act opening the land to settlement forbade settlement upon any of the lands prior to the hour at which they were opened to entry, at 9 a. m., at the local office on December 20, 1890; they therefore both settled upon these lands now in issue at that hour, and commenced permanent improvements, and have both finished houses in which they established their residence, and did some clearing.

But the evidence further shows that Box was upon this land between the 10th and 20th of December, and went over it.

The land thus opened to settlement, and of which the tract in issue was a part, was returned to the public domain for homestead entry by the act of Congress of June 20, 1890, (26 Stat., 169). Section three thereof is as follows:

That no rights of any kind shall attach by reason of settlement or squatting upon any of the lands hereinbefore described before the day on which such lands shall be subject to homestead entry at the several land offices, and until said lands are opened for settlement no person shall enter upon and occupy the same, and any person violating this provision shall never be permitted to enter any of said lands or acquire any title thereto. This act shall take effect six months after its approval by the President of the United States.

The case of *Dereg v. McDonald* (17 L. D., 364) considered to some extent the question here raised. The syllabus of that case is as follows:

One who enters upon the reservoir lands restored to the public domain by act of June 20, 1890, prior to the time fixed therefor, and remains thereon until said lands are subject to settlement, is disqualified as a settler under said act.

It is true in that case the settler was on the land at the hour of opening, whilst in the case now under consideration, he was outside and re-entered at nine o'clock on December 20th, but the evident intention of the act was to put all persons upon an equality, and to prevent what the settler, Francis L. Box, did knowingly.

It is therefore held that where one purposely entered these reservoir lands prior to December 20th, and was on the land which he subsequently settled upon, even though, as a matter of fact, he was outside when the lands were opened for settlement, his entry disqualified him from making a homestead entry therein.

The cases of *Aloys Eck, et al.* (7 L. D., 219) and *ex-parte Josephus A. Pyle* (3 L. D., 361), cited by counsel for Box, are clearly not in point as sustaining his right to enter these lands during the prohibited period.

As between the entryman Dammon, and the settler Jessie Sinclair, the decision appealed from seems to be based upon the finding that as the settler went upon the land at 9 a. m., and as Dammon's application to enter was delayed on account of the applications of the two policemen, that as a matter of fact the settlement of Jessie Sinclair was made a few moments prior to the entry of Dammon. Upon this point the evidence is conflicting, and Dammon argues here that such finding was not supported by the evidence. For the purposes of this decision it may be assumed that his contention is right, and that the settlement was made at the same moment of time that the entry was allowed—that they were simultaneous.

In the case of *Neil v. Southard* (16 L. D., 386), it was held that the right of a settler who is on land embraced within the entry of another, attaches at once on the relinquishment of said entry, and defeats an application to enter filed by a third party immediately after said relinquishment.

This language is again used in *Stone v. Cowles* (13 L. D., 192).

And in *Zaspell v. Nolan* (13 L. D., 148)—

A timber culture entryman who files a relinquishment and thereupon applies to enter the land under the homestead law, can not thereby defeat the adverse right of a settler who is residing upon said land at the date of relinquishment.

These decisions are sufficient to show that whenever there is a conflict between a settler and an entryman, this Department gives to him who has done some act upon the land looking to its permanent improvement, the superior right.

It is therefore held that where settlement and entry are simultaneous, the entry will be canceled, and the settler allowed to make entry for the land.

The decision appealed from is therefore affirmed.

Approved,

JOHN I. HALL,

Assistant Attorney General.

SOUTH OKLAHOMA *v.* COUGH ET AL.

Motion for rehearing in the case above entitled (see 16 L. D., 132) denied by Secretary Smith, February 19, 1894.

SURVEY—MEANDERED STREAM.

JAMES SMITH.

A meander line, run along one bank of a stream for the purpose of establishing a boundary between the public domain and a reservation, will not be treated, after the restoration of the reserved lands, as bringing said stream within the category of "meandered" streams, where it does not fall within the class of streams properly meanderable under the law.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (J. I. P.)^{*}

On November 5, 1892, your office, by letter of that date, notified the local office at Burns, Oregon, that homestead entry No. 38, made by James Smith October 12, 1889, embracing lots 2, 3, 6, 7 and 9, Sec. 6, T. 22 S., R. 30 E., was suspended for the reason that said tracts were on both sides of a meandered stream (the Silvies River) and were not, therefore, contiguous. The local office was also directed to notify Smith that he would be allowed thirty days from receipt of notice to elect which subdivision he would surrender, so as to confine his entry to one side of said stream—citing the case of *Charles C. Hill* (15 L. D., 98)—and that in the event of his failure to so elect, his entry would be held for cancellation.

Smith appealed from said decision or ruling, and by letter of January 16, 1893, your office transmitted said appeal, with the accompanying papers, to this Department.

By letter "C" of February 6, 1893, the Assistant Commissioner of your office requested that early consideration be given said appeal, that cases involving the question presented by said appeal were constantly arising, and quoting from the case of Charles C. Hill, *supra*, that "a homestead entry of a tract that embraces land on both sides of a meandered stream will not be allowed."

The appeal of Smith is on the ground that the decision appealed from is erroneous, for the reason that the Silvies River is not a meandered stream.

The question presented involves the consideration of what is a meandered stream, as determined by the practice and decisions of this Department.

In the case of Hattie Fuhrer (12 L. D., 556), it was held,—
that the uniform practice of the Land Office has always been to limit the meandering of streams to those having a right angle width of three chains and upwards, although the rule was never embodied in the manual of survey until 1890;
and it is further declared in said decision that

the fact that the stream has been meandered should not operate as a bar to the claim of appellant, when it is satisfactorily shown by the records of survey that such stream does not fall in the class to be meandered.

An examination of the records of survey relative to the stream and tracts in question, shows that what is designated on the plats of survey of several townships in Oregon as the Silvies River was the southwestern boundary of what was formerly the Malheur Indian reservation. That when the public lands south and west of said river were surveyed, about 1873, the right or southern and western bank of said river was meandered for the purpose of establishing the boundary line between the public domain and said reservation. This is evidenced from the fact that said stream was only meandered through those sections opposite said reservation, and none other. When said reservation was restored to the public domain, the lines of the survey north and east of said river, established about 1883, were connected with those south and west thereof, and in estimating the quantity of land to be included within the legal subdivisions thus established, lands on both sides of said stream, including the area of the river itself, were included. Furthermore, the average width of the Silvies River, in the sections where the said meander line was run, is from fifty to sixty links.

The case of Charles C. Hill, *supra*, did not present the question here involved. In that case it is declared that,—

the reason why the stream was meandered, is not a material question, nor subject of consideration, upon appeal, when the fact of the actual existence of the meandered stream is conceded as in this case.

In the case at bar, that fact is not conceded, but explicitly denied. True, the Hill case had reference to the same stream and the same general body of land. But because Mr. Hill saw fit to concede the point that is here in issue, Smith should not be estopped from showing that the stream in question does not belong to the class of streams that are meanderable under the law, and that the line run by the surveyor along the right bank of said stream was not intended for a meander line, but for a boundary line. The Manual of Surveying, p. 33, declares the following streams to be meanderable—

Both banks of navigable rivers, as well as of all rivers not embraced in the class denominated as "navigable," the right-angle width of which is three chains and upwards, will be meandered on both banks by taking the general courses and distances of their sinuosities, and the same are to be entered in the field-book. Rivers not classed as navigable will not be meandered above the point where the average right-angle width is less than three chains.

This manual has been legalized by act of Congress, and has the force and effect of law. *Winscott v. Northern Pacific R. R. Co.*, 17 L. D., 274; Revised Statutes, Sec. 2399.

In view of the fact that the Silvies River is not a navigable stream, and is only about one-sixth the width required for streams that are not classed as navigable, and in view of the other facts herein set forth, I am clearly of the opinion that said river is not a meandered stream within the meaning of the rule, notwithstanding the fact that a meander line was run on the right bank of said river for the purpose herein stated. If otherwise legal, I can see no reason why Smith's entry, embracing land on both sides of said river, should not stand as though no meander line had ever been run as stated.

The appeal is therefore sustained, and your decision is modified accordingly.

Approved,

JOHN I. HALL,

Assistant Attorney General.

PRACTICE—APPEAL—MAILING.

MCLEOD *v.* LA ROCK.

Mailing an appeal, properly served on the opposite party, within the time allowed for taking an appeal from the General Land Office, does not bring said appeal within the rule as to time, if not received at the General Land Office within the period fixed therefor.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (E. M. W.)

I am in receipt of a motion filed in the case of John McLeod *v.* Alexander LaRock by the former to dismiss the appeal of the latter from your judgment of September 3, 1892, in said case wherein you rejected

the final proof of LaRock and awarded the NW. $\frac{1}{4}$ of Sec. 20, T. 21 N., R. 7 W., Olympia, Washington, to McLeod.

The motion is made under the order of January 17, 1891, (12 L. D., 64), providing that motions may be made to dismiss pending cases on jurisdictional questions arising on the record.

Said motion sets forth that the alleged appeal was not filed within the seventy days allowed for that purpose by rule 87, of the Rules of Practice (4 L. D., 37).

From the facts shown it appears that notice of your judgment of September 3, 1892, was served on the attorney for LaRock on September 9, 1892, by registered mail, sent to him by the register of the land office at Olympia, Washington, and on November 19, 1892, LaRock's appeal was filed in the Commissioner's office.

LaRock served notice of his appeal on the attorney of McLeod on November 7, 1892, and claims to have mailed the appeal on November 9, 1892, at the postoffice in Olympia, Washington, addressed to you, and had the letter duly registered. This letter is shown to have been received by you on November 19, 1892. The appeal was not filed until November 19, 1892, which was the seventy-first day after LaRock's attorney had been notified by registered letter of your judgment.

Rules 86 and 87, providing for appeals from your judgment are as follows—

Rule 86. Notice of an appeal from the Commissioner's decision must be filed in the General Land Office and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision.

Rule 87. When notice of the decision is given through the mails by the register and receiver or surveyor-general, five days additional will be allowed by those officers for the transmission of the letter and five days for the return of the appeal through the same channel before reporting to the General Land Office.

It is contended by LaRock, not that the appeal was filed in the land office in time under the rules, but that he *mailed* the appeal properly served on the opposite side, within the time allowed by the rules.

This contention is untenable, for mailing a letter to the land office is not filing an appeal. A post office is no branch of your office, and when LaRock neglected to prepare and serve notice of his appeal until the eleventh hour, he must be held to have assumed the risk of the appeal not reaching its destination in time under the rules.

The rules of practice contemplate that appeals from your judgment where notice is served by the register should be forwarded through the local office; but in this case LaRock forwarded his own appeal direct to you, and it did not reach your office until November 19, 1892, or on the seventy-first day, one day too late.

The motion must be, and is, granted, and the appeal dismissed, because not taken in time under the rules. *Graham v. Lansing* (13 L. D., 697).

Approved,

JOHN I. HALL,

Assistant Attorney General.

OKLAHOMA TOWNSITES—PRACTICE—APPEAL.

WATT ET AL. v. COLUMBIA TOWNSITE.

The departmental instructions with respect to the time allowed for appeals in Oklahoma townsite cases were intended to be applicable to all cases in which townsites are parties.

As said instructions provide for an exception to the regular practice, failure to comply therewith will not defeat the right of the appellant to be heard, where it appears that his action was based on the construction of said requirement adopted by the local office.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (E. M. R.)

This case involves the NE. $\frac{1}{4}$, Sec. 24, and SE. $\frac{1}{4}$, Sec. 13, T. 11 N., R. 6 W., Oklahoma Territory.

The record shows that on May 16, 1889, John W. Evarts filed in the land office, at Kingfisher, an application to enter the above tract for townsite purposes.

February 27, 1890, Alexander N. Spencer made application to enter under the homestead law, the SE. $\frac{1}{4}$, Sec. 13, T. 11 N., R. 6 W., which was refused because of conflict with the above application. No appeal was taken, but subsequently, Spencer filed contest to the townsite application, alleging that the tract described was wholly unoccupied and unimproved.

On March 5, 1890, John B. Watt filed an affidavit of contest as to the NE. $\frac{1}{4}$ of Sec. 24, alleging substantially the same as Spencer.

By letter "G" of June 13, 1891, your office ordered a hearing, and the case came up for trial before the register and receiver September 7, 1891. On October 28, 1891, they rendered their joint opinion, awarding the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 24, T. 11 N., R. 6 W., to the townsite of the city of Columbia; to the contestant, Spencer, as a homestead, the SE. $\frac{1}{4}$, Sec. 13, T. 11 N., R. 6 W., and to the contestant Watt, as a homestead, the S. $\frac{1}{2}$ and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 24, T. 11 N., R. 6 W. In their decision they state that thirty days are given for appeal to the Hon. Commissioner of the General Land Office.

Notice of the decision of the register and receiver was given by personal service upon the attorneys of the parties on October 31, 1891. The townsite claimants made two appeals: one on November 27, against the contestant Watt, and one on November 30, 1891, against Spencer. Watt appealed November 25, 1891.

On June 14, 1892, Spencer moved that the appeal of the townsite claimants be dismissed, because not taken in time.

April 5, 1893, your decision was rendered, and the several appeals taken in the cause were dismissed on the aforesaid motion of Spencer.

On August 21, 1890, Secretary Noble issued the following instructions: (12 L. D., 187.)

To avoid delays likely to occur in the prosecution of appeals in townsite cases in the Territory of Oklahoma, under existing rules, whether as to original location of lots, or otherwise, now pending, or that may hereafter arise, it is deemed advisable to modify the rules of practice relative to appeals, rehearings and motions for reviews, relating thereto, so that time allowed for taking appeal and serving notice thereof, with due specifications of error and argument, shall in all cases, be limited to ten days from receipt of notice of the decision, with a like period allowed the appellee, after he, or his attorney of record, shall have received notice of said appeal, specifications of error and argument, within which to file argument in response.

All motions for review and rehearing shall be filed within ten days after the judgment complained of, as herein provided for in case of appeal. If neither party shall present his appeal or motion for review within the time herein provided for, you will consider the case closed, and proceed accordingly.

In the regulation promulgated by Secretary Noble to the trustees of townsites in Oklahoma Territory, of June 18, 1890, (10 L. D., 666, p. 670, Sec. 13, thereof) we find that appeals from the trustees to your office should be taken in the same manner as from the local officers, save as to time; ten days only being allowed for appeal. Therefore, it appears that the order quoted, *supra*, was not intended as a mere reiteration of that of June 18th, but was meant to further change the rule of practice in all cases where townsites were parties. The necessity of the rule grew out of the numerous suits between townsite settlers and the necessity of an early settlement of the questions between them can not be greater than that of an early adjudication between the town in its entirety and an agricultural claimant. Necessarily this must be so as no title to lots could pass pending the result of the contest between the town and the homestead claimant. "To avoid delays likely to occur in the prosecution of appeals in townsite cases in the Territory of Oklahoma under existing rules, whether as to the original location of lots *or otherwise*," is language sufficiently broad to cover the case now under consideration.

It therefore follows that the construction placed upon the order by your office is correct, and if no other question was presented by the case, the same would here be affirmed; but the register and receiver, in their decision, say: "Thirty days are given for appeal to the Honorable Commissioner of the General Land Office." This Department has uniformly held that a statutory right cannot be enlarged through erroneous action of the local officers. *Krichbaum v. Perry* (5 L. D., 403); *Call v. Swan* (3 L. D., 46), and *Doten v. Derevan* (3 L. D., 254). In the last named case two exceptions are given to the above rule:

First, those coming directly under the literal rendering of the decision, where the public officer has refused the benefit of the law to an individual who has complied with the law. See my decisions in the cases of *Edward R. Chase*, December 12, 1882 (1 L. D., 81); *Schmidt v. Stillwell*, November 13, 1882 (*Idem*, 151); and *Marshall v. Ernest*, November 15, 1884 (3 L. D., 279).

Second, those in which the individual has failed to comply with the demands of office practice or department rulings, because of being misinformed or left uninformed regarding them through the error or negligence of government officers. See my decision in the case of *Gardner v. Snowden* June 30, 1883.

It appears to me that the case now under consideration comes under the second exception. The question was a new one and had never been passed upon by this Department, and, whilst every one is presumed to know the law, it has been said that "action taken under the advice of the local officers should be without prejudice unless required by the absolute demands of the law." *Schmidt v. Stillwell* (1 L.D., 151) and *Vettel v. Norton* (Idem, 459). In consideration then of the absence of departmental construction of the order of Secretary Noble of August 21, 1890, and of the time stated in the local officer's decision—given in an official way in the promulgation of their decision, when the rule was not made by statute and was an exception to the regular practice—it does appear that the statement made by the local officers, which was acted upon by the parties litigant, should not deprive them of their right of appeal. The decision appealed from is therefore set aside and the case is remanded to your office to pass upon the question raised by the appeals, as the prosecution of cases contemplates a decision by you before they come here for final adjudication.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

HOMESTEAD ENTRY—NON-CONTIGUOUS TRACTS.

JENKINS v. SEIBEL.

A homestead entry embracing tracts that are non-contiguous by reason of a prior mining claim can not be perfected on final proof as to any part thereof where the residence and improvements have been confined to a small tract not contiguous to the main body of land covered by the entry.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (P. J. C.)

The land in controversy in this appeal is the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 4, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ (or lot 2) of Sec. 9, T. 3 N., R. 14 E., Stockton, California, land district.

The record shows that John Seibel made homestead entry of said tract January 15, 1885. On July 6, 1888, he abandoned and relinquished "all claim to so much of the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 9, T. 3 N., R. 14 E., as is covered by the location of John McQuig for the White Pine Quartz Mine, described as lot 56 in said section." After giving notice he offered final proof on the land as described in Sec. 4, but that contained in Sec. 9, is described as "lot 2," October 23, 1891, when William H. Jenkins appeared and filed a protest against the acceptance of the final proof, alleging that on January 17, 1889, he, and one James N. Thompson, located a placer mining claim of twenty acres on the SW. $\frac{1}{4}$

of the SW. $\frac{1}{4}$ of Sec. 4; that said land is valuable placer mining ground; that it contains gold in paying quantities, and is more valuable for mining than agricultural purposes; that a quartz mine is located on "lot 2," and that Seibel "has not resided upon nor cultivated said homestead as required by law."

A hearing was had before the local officers, and as a result they recommended "that the proof submitted should be rejected and that claimant should be required to procure a segregation of the mining claims and show a compliance with the provisions of the homestead law." Seibel appealed, and by your office letter of August 9, 1892, the judgment of the register and receiver was reversed, whereupon the protestant prosecutes this appeal, assigning as error, substantially, that your said office decision is against the law and the evidence.

From an examination of the testimony, I am of the opinion that the protestants have not sustained their charges as to the mineral character of the land. But a more serious question is presented by reason of the "relinquishment and abandonment" filed by the homestead claimant, which affects his residence. There is filed in this office a motion for a rehearing of the case on account of newly discovered evidence. By this motion, and accompanying affidavit, it is shown that Seibel did not reside upon the land claimed in his homestead entry since the relinquishment of the land included in lot 56, and that neither his house or any of his improvements are upon the land that he offered final proof upon. A plat of the ground is submitted, the correctness of which is not denied, and, by an examination of the official survey of the White Pine mining claim on file in your office upon which patent was secured, I find it to be substantially correct. By this plat it is shown that the patented mining claim, consisting of a fraction less than nineteen acres, is located on the south half of said NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 9, and extends entirely across it from east to west, and includes all of said south half, except a very small triangular shaped piece of perhaps less than an acre, at the SE. corner of said forty. It is on this SE. corner that the residence and improvements of the homestead claimant are placed, and the south boundary line of said mining claim is shown to run through the house. The balance of the "forty" north of the White Pine is what is denominated "Lot 2." The result of this division is that the little triangular shaped piece upon which Seibel lives is entirely disconnected from the balance of the land upon which he offered final proof.

Seibel, in his affidavit, filed in opposition to the motion for a new trial, admits the relinquishment of the White Pine and the location of his residence, but claims

that the survey stakes as set by said mineral deputy Coulter in his patent survey for said White Pine Quartz Mine did not take in the house of this deponent, and that his use and occupation of said homestead tract is now and ever since his said abandonment has been the same as before he made said abandonment.

In the case of *Lannon v. Pinkston* (9 L. D., 143), it was held (syllabus)—

Where a homestead entry covers contiguous tracts, and a segregation of a part thereof is made necessary by a subsequent discovery of mineral, the entry will stand intact as to the agricultural tracts, though rendered non-contiguous by the segregation survey.

In that case the discovery of mineral and location of the mineral claim was made subsequent to the homestead entry. But in the case at bar, it is shown by an examination of the record in your office that the discovery of the White Pine was made in 1863, and the claim was located January 1, 1880. It will thus be seen that at the date of Seibel's homestead entry there was a subsisting mining location on record. Of this location the homestead entryman is presumed to have notice. The location segregated the land; hence it follows that Seibel's residence on and improvements of the small tract not contiguous to the main body of the land, the contiguity of the tract having been broken by the previous location of the mining claim, was insufficient under the homestead law. This being true, it necessarily follows that his proof cannot be accepted, as residence on the land is a necessary prerequisite under the homestead law to entitle the claimant to make final entry.

This determination renders it unnecessary to pass upon the motion for a re-hearing, as the admissions of Seibel clearly defeats his claim.

The judgment of your office is therefore reversed, and you will direct that his homestead be canceled.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

WADE v. SWEENEY.

Motion for the review of departmental decision of May 5, 1892, 14 L. D., 466, denied by Secretary Smith, February 19, 1894.

HOMESTEAD CONTEST—RELINQUISHMENT.

DE HAVEN *v.* GOTT.

A contest against a homestead entry charging abandonment and failure to establish residence is premature if brought prior to the expiration of the period accorded under the law for the establishment of residence.

The holder of a relinquishment will not be allowed to contest the entry covered thereby.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (C. W. P.)

It appears that April 9, 1892, Abraham H. De Haven filed an affidavit of contest against the homestead entry of William D. Gott for the SW $\frac{1}{4}$ of Sec. 8, T. 16 N., R. 4 E., Guthrie land district, Oklahoma, alleging that Gott had never established residence on the land; that he never improved it; had wholly abandoned it; and that he had sold and assigned his duplicate receipt and parted with all interest in the land.

Gott's entry was made on the 10th of October, 1891.

The register and receiver rejected said contest because the charges set out in the affidavit of failure to comply with the law were premature and because the allegation of sale was too indefinite. De Haven appealed. Your office affirmed their decision. A further appeal brings the case to the Department.

1. Clearly, the contest on the ground of abandonment and failure to settle and improve the land, brought on the 9th of April, was premature. *Bennett v. Baxley* (2 L. D., 151).

2. It appears from the affidavits filed by De Haven, that the relinquishment of Gott's entry was in De Haven's possession, for a valuable consideration, when he initiated his contest, but that it could not be filed because of a defect in form, and that the contest was brought to protect his rights until he could procure a relinquishment in proper form.

The holder of a relinquishment is not allowed to contest an entry. *Brown v. Baldwin* (5 L. D., 5); *Eva Brown* (3 L. D., 150).

For these reasons the judgment of your office is affirmed.

Approved,

JOHN I. HALL,

Assistant Attorney General.

EVERETT *v.* ZIMMERMAN.

Motion for review of departmental decision of July 7, 1893, 17 L. D., 93, denied by Secretary Smith, February 19, 1894.

HOMESTEAD—SECOND ENTRY.

JAMES M. FROST ET AL.

The right to make a second homestead entry may be properly recognized, where the first, through no fault of the claimant, was defeated by an intervening adverse claim.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (J. I. P.)

On January 25, 1893, by letter "C" of that date, your office transmitted to this Department the appeal of Elias Berry from the order of your office of November 15, 1892, directing him to show cause why his homestead entry No. 5213, made August 16, 1892, embracing the SW. $\frac{1}{4}$ of Sec. 19, T. 12 N., R. 5 E., Oklahoma land district, Oklahoma Territory, should not be canceled for conflict with homestead entry No. 5103, for the same land, made August 1, 1892.

The record shows that on January 29, 1892, Frost, who was then a resident of Kansas, filed soldier's declaratory statement No. 241 for the land described. That on July 18, 1892, Berry filed soldier's declaratory statement No. 608 for the same land.

On August 1, 1892, Frost made homestead entry of said land, as alleged, and on August 16, 1892, Berry also made homestead entry of said tract, as stated.

There is filed with the papers in the case the following agreed statement of facts.

Before the Honorable Secretary of the Interior, Washington, D. C.

ELIAS BERRY, Contestant,	} Involving SW. $\frac{1}{4}$ of Sec. 19, Tp. 12, N. of Range 5 East, I. M. Oklahoma City, O. T.
JAMES M. FROST, Contestee.	

Now on appeal to the Honorable Secretary of the Interior—An agreed statement of facts in the above entitled case.

In order that justice may be done both parties and to avoid extensive litigation Elias Berry and James M. Frost, plaintiff and defendant above named, do hereby stipulate and agree that the following is a true and complete statement of all the facts in this case;

First; That the records of the filings and entries of both parties as shown at the United States Land Office at Oklahoma City, O. T., are correct;

Second; That both of said parties served in the army of the United States during the late war;

Third; That both of said parties have acted in entirely good faith in all that they did in their endeavors to secure title to the tract in dispute;

Fourth; That said James M. Frost was prevented from arriving at the U. S. Land Office at Oklahoma City, O. T., in time to make his homestead entry within six months after date of his S. D. S. by circumstances beyond his control;

Fifth; That Elias Berry was erroneously informed at the time he made his S. D. S. for the above described tract, that James M. Frost had abandoned the same and would not settle upon and homestead the land, and when he came to Oklahoma City

to file for said tract he was informed by an attorney that Frost's time for making homestead entry had expired, or in words to that effect;

Sixth; That each of the said parties have settled upon said tract; but that said Elias Berry had made the most valuable improvements thereon; and for this reason both parties are willing that the tract may be awarded to him (said Berry) provided the homestead right of said Frost may be restored. That neither party has received or been promised any compensation for abandoning the tract in question.

Upon the foregoing statement of facts, we are willing to have the case decided and as the case is now pending before the Honorable Secretary of the Interior, we ask him to award the tract in question to the one whom in his wisdom he may consider most entitled to the same; and we ask that the other party may be allowed to relinquish his homestead and make another homestead entry for other lands subject to such entry.

We ask this in a fraternal spirit as old comrades who are anxious for the promotion of the welfare of both and that both in old age, and being poor men, may be enable to secure homes for themselves and families.

Very respectfully submitted,

ELIAS BERRY
JAMES M. FROST

Subscribed and sworn to before me this 10th day of January, A. D. 1893.

J. C. DELANCEY

We earnestly join in urging that the prayer of the two old veterans be granted, the facts stated we personally know to be true.

Very respectfully,

D. D. LEACH, *Register*,
J. C. DELANCEY, *Receiver*.

There is also filed with the other papers in the case, what appears to be a complete transcript of all the papers and record in the case, attached to which is an affidavit of Frost's, in which, after reciting the history of the case, as herein set forth, he makes the following statements—

Your affiant further swears that he has contested the homestead entry No. 1664 of William Janicke, upon the W. $\frac{1}{4}$ SW. $\frac{1}{4}$ of section 17 and E. $\frac{1}{4}$ SE. $\frac{1}{4}$ of section 18 in township 12 N., of range 5 east of the Indian meridian.

The said case was heard on the 29th day of May, 1893, said defendant making default. That he—this affiant—paid the expenses of said contest, and that said entry was held for cancellation. Wherefore he asks that his right to make homestead entry be restored and that he be allowed to enter the said tract for which he has contested as herein stated.

He further swears that he has not sold his right or claim to the tract entered, nor relinquished his said homestead entry thereon, nor agreed to do so, and that he has not received nor been promised any money or anything else for abandoning the originally entered tract, and he makes this application for the purpose of securing a home for himself and family.

JAMES M. FROST

Subscribed and sworn to before me this 14th day of August, 1893.

DEMEY LEWIS,
Notary Public.

In the case of Thurlow Weed (8 L. D., 100), the following statement and ruling is made—

It clearly appears that Weed was acting in good faith in trying to secure a homestead for his family, and that he made the first entry in ignorance of the rights of

the pre-emptor and of the fact of a pre-emption filing. He could maintain his entry, if at all, only by a contest, which was likely to be bitter and expensive, and which there is no reason to assert would have been successful. Upon the full condition of his chances being apparent he withdrew, and asked to be placed in the position he would have been placed in had he made no mistake. I think his excuse sufficient, especially in view of the only prohibition of the statute being against acquiring title to more than one quarter section.

If exceptions are to be allowed to the rule of but one homestead entry—and the exception appears to be well established doctrine, and quite as supportable as the rule itself—they should be admitted whenever justice clearly requires, and no bad faith or fraud is shown, and the failure to discover the obstacle to the first entry is fairly excusable. A mistake, which involves no wrong, and is attributable to causes reasonably likely to produce it, ought rarely to forfeit the privilege of gaining one homestead, when honestly sought in good faith by a genuine settler with a family.

And the conclusion reached in that case is stated in the syllabus as follows—

The right to make a second entry recognized where the first was made in good faith but subsequently abandoned by the homesteader on account of conflict with the *bona fide* pre-emption claim of another.

In the case of Charles Wolters (8 L. D., 131), the following statement is made with reference to the rule of only one homestead entry allowed—

To impose such a rule, under such a showing, nothing less than an unbending statute should be necessary. The rule which limits to one homestead entry is based upon a view of the statute which I follow only because it has long been maintained in the Department and Land Office and has some public considerations in support of the general policy; but it has been repeatedly engrafted with exceptions where justice required exception. Indeed, if underlying principle be sought for the exceptions made, none other can be fairly stated. Nor, would one be found where justice seemed more cogently to demand exception than in this instance.

And the conclusion reached is stated in the syllabus, as follows—

The right to make the second entry accorded, where the first, for equitable reasons, was relinquished in good faith on discovering that the land embraced therein was covered by the settlement right of a prior pre-emptor, who, on account of poverty, had been unable to submit his final proof within the statutory period.

I am inclined to the opinion that the equities in this case are as strong as those in either the Weed or Wolters case, *supra*.

The poverty of the parties, their manifest good faith, and honest endeavor to secure a home for themselves and family their indisposition and inability to enter into lengthy and expensive litigation, together with the other facts disclosed, make this case, in my judgment, an exception to the rule, of only one homestead entry allowed.

An examination of the records of your office discloses the fact that the entry contested by Frost,—the lands embraced in which he makes application to enter,—has not been canceled. That indeed no report of said contest has ever been reported from the local office.

Should that entry be ultimately canceled, you will direct the local office to permit Frost to make entry of the lands embraced therein, as per his application.

Should said contest result adversely to Frost, or should he at any

time abandon it, and make application to enter other lands, you will direct the local office to forward said application to your office for its action thereon, and make reference to this decision.

You will allow homestead entry No. 5213, made by Berry August 16, 1892, to remain intact, and, in order that the record may be cleared, you will direct the local office to cancel homestead entry No. 5103, made by Frost August 1, 1892, for the same land.

Approved,

JOHN I. HALL,

Assistant Attorney General.

DESERT LAND CONTEST—JOINT CONTESTS.

HAMILTON ET AL. *v.* TEVIS.

A charge against a desert land entry that the said tract of land is not now, nor never was desert land in character or quality is sufficient to warrant a hearing as to the character of the land.

The right of two or more contestants to unite in a contest against a desert land entry can not be recognized to the exclusion of intervening contestants.

Common allegations, in pending applications of different parties to contest the same desert entry, may be accepted as corroborative of the separate affidavits of contest.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (A. E.)

The record of this cause shows that on March 22, 1877, Lloyd Tevis filed a declaration of his intention to reclaim within three years the E. $\frac{1}{2}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of sec. 22, T. 26 S., R. 26 E., Mount Diablo, base and meridian, Visalia land district, California.

This tract comprised four hundred acres, and Tevis paid the sum of twenty-five cents per acre, aggregating one hundred dollars, as required by the desert land act of March 3, 1877, by virtue of which he made the claim.

On September 12, 1877, the Secretary of the Interior ordered the suspension of all claims made in this district under the provisions of the desert land act, in order that an investigation might be made as to the character of the land covered by each claim.

During this suspension several contests were filed against the entry of Tevis, charging that the land was not desert in character.

The first of these contests was by J. W. Hamilton, on December 22, 1887. This was refused because of the suspension, but the affidavit was forwarded to this Department. Then followed the contest by Edward F. Bentley and Sarah A. Bentley, on March 14, 1888; that of W. H. Davenport on April 2, 1888; and of James W. Howell on April 30, 1888. All these contest affidavits were forwarded to this Department.

On January 12, 1891, the order of suspension was revoked, and the

above contest affidavits were returned to your office for "appropriate action." (12 L. D., 34.)

Subsequently, on February 19, 1891, contests were filed by J. J. Leek, J. M. Sexton and George S. Sexton against the same entry.

On December 20, 1891, Hamilton and Davenport applied to make a joint contest, under the instructions of your office that such joining of contestants might be allowed.

On October 13, 1891, the local office dismissed the contest of Hamilton, dated December 22, 1887, because "the allegations in the affidavit of contest do not attack the validity of the entry at the time of entry, and . . . are not corroborated," and refused the joint contest until after intervening contests had been determined.

On appeal, your office by letter ("H") of August 5, 1892, affirmed this decision, and added as reasons that the joint contest affidavit lacked corroboration; and that the filing of the joint contest was a waiver of the rights of both Hamilton and Davenport, acquired by reason of their individual contests.

An examination of Hamilton's contest affidavit of December 22, 1887, shows his charge to be "that the said tract of land is not now, nor never was desert land in character or quality," and contestant further states "that this he is ready to prove at such time and place as may be named." As the proving of this charge would be all that would be necessary to secure the cancellation of the entry, it can not be seen wherein the charge is bad; therefore the local office was in error in dismissing it.

When these contest affidavits were returned to the local office for appropriate action, it was expected that each contest would be taken up and disposed of in the order of filing. When Hamilton and Davenport applied to make joint contest of the entry of Tevis, that joint contest should have been rejected, because the joining of the first and third contestant would cut out the right of the second, and such a joining was not contemplated by the order allowing two or more to join. It can not be said that any of these applications to contest lack corroboration, in view of the numerous charges on file against this entry, and a dismissal on that ground is not good. (*Jopling v. Anderson*, 16 L. D., 329.)

An objection might be raised to this decision by reason of the ruling in *Waters et al. v. Sheldon* (7 L. D., 346), which was that "The institution of a second contest is a waiver of any rights the contestant may have had under the first." But in this case the joint contest of Hamilton and Davenport was not a second contest, but was the joining of the two individual contests previously made, in compliance with the suggestion of your office, in order that expense might be saved the contestants, and that the land office might be relieved of so many contests.

Your office decision is therefore modified, and you will act as follows:

Dismiss the joint contest of Hamilton and Davenport, and allow the individual contest of Hamilton to be proceeded with, holding Davenport's contest for its turn.

As there are four hundred acres in this claim, Hamilton may join with him the two Bentleys, if he and they desire, or even add Davenport, but in case of success, they would be compelled to confine their entries to such equal portions of the four hundred acres as they might agree upon.

It must be understood that all testimony must be confined to the character of the land in December, 1877.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

COMMUTED HOMESTEAD—SECTION 6, ACT OF MARCH 3, 1891.

EAMES *v.* BOURKE.

The period of fourteen months residence and cultivation required of applicants for the right of commutation under section 6, act of March 3, 1891, is computed from the date of entry and not from settlement.

Secretary Smith to the Commissioner of the General Land February 19,
1894. (C. W. P.)

Michael J. Bourke has appealed from the decision of your office holding his final certificate and proof until the expiration of fourteen months from the date of his entry of the NE. $\frac{1}{4}$ of Sec. 15, T. 47 N., R. 40 W., Marquette land district, Michigan.

The reason for said holding was that the 6th section of the act of March 3, 1891 (26 Stat., 1095), amending section 2301 of the Revised Statutes, requires parties proposing to commute their homestead entries to cash, to make proof of settlement and of residence and cultivation of the land for a period of fourteen months from the date of entry.

The original entry of Bourke was made January 4, 1892, subsequent to the passage of the act of March 3, 1891, and consequently is governed by that act. The meaning of the amended section is too plain for controversy. The language is fourteen months after the date of entry, not after settlement.

The decision of your office is affirmed.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

WILLIAMS *v.* THOMAS.

Motion for review of departmental decision of March 24, 1893, 16 L. D., 320, denied by Secretary Smith, February 19, 1894.

PRACTICE—NOTICE OF APPEAL—ACCEPTANCE OF SERVICE.

JULIEN v. HUNTER.

The acceptance of service of notice of appeal, without objection thereto, does not waive the right of the appellee to be subsequently heard on a motion to dismiss said appeal on the ground that it was not taken in time.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (S. C. T.)

On the 7th of June, 1889, John Hunter made homestead entry for the SE. $\frac{1}{4}$ of Sec. 11, T. 18 N., R. 5 W., Kingfisher land district, Oklahoma, and the question presented by the case before me, involves his right to amend said entry, so as to exclude the land described therein, and include the SW. $\frac{1}{4}$ of Sec. 12, T. 17 N., R. 6 W., in the same land district.

Such amendment was recommended by the local officers, notwithstanding the protest of Alva H. Julien, and on the 9th of May, 1892, a decision was rendered by your office, in which all the facts and circumstances of the case are recited, and the opinion expressed that the action of the local officers in the matter was correct. Their decision was therefore affirmed, the protest of Julien dismissed, and his application to make homestead entry for the tract disallowed.

On the 14th of June, 1892, the attorneys for the respective parties to the controversy, signed a statement as follows

We, the undersigned, attorneys of record in the contest case of Julien v. Hunter, involving the right of John Hunter to amend his homestead entry, dated June 7, 1889, for the SE. $\frac{1}{4}$ of Sec. 11, T. 18 N., R. 5, to the SW. $\frac{1}{4}$ of Sec. 12, T. 17 N., R. 6 W., do hereby accept service of notice of the decision of the Commissioner of the General Land Office, by his letter "H," of May 9, 1892, wherein he affirms the decision of this office, and recommends that the contest be dismissed. The plaintiff herein acknowledges receipt of a copy of said decision.

This writing is upon a sheet of official paper of the Kingfisher land office, and is marked as filed therein June 14, 1892.

On the 16th of August, 1892, the attorneys of Julien filed in the local office an appeal to the Department, from the decision of your office, and on the same day one of the attorneys for Hunter acknowledged service of a copy of such notice of appeal, and specification of errors.

On the 22d of said August, the attorneys for Hunter filed in the local office, and served upon the attorneys for the opposite party, a motion to dismiss said appeal, upon the ground that it was not filed within the time allowed by the rules of practice of the Department.

A protest against said motion to dismiss, was filed by the attorneys for Julien, on the 27th of said August, supported by the affidavit of one of the said attorneys, who alleged that the date of his acceptance of notice of the decision of your office, was the 17th of June, 1892, and not on the 14th of that month, and in proof of this statement cites the

fact that upon the copy of said decision served upon him, he made an endorsement as follows: "Accepted service June 17, 1892."

The case of *Dean v. Simmons* (15 L. D., 527), presented a question somewhat similar to this. In that case, the attorney accepted notice of decision on the 24th of March, 1892, but minuted the date of such acceptance upon his contest docket as March 31,—just one week later. His appeal was rejected for not having been filed in time. Upon application for certiorari, the Department held that the writ might be allowed in such a case, where the mistake was satisfactorily explained, and where such action would not result in injury to innocent parties." In that case, there was no objection to the granting of the writ, while in the case at bar there is a formal motion for the dismissal of the appeal. The rule of that case, therefore, cannot be applied here, on account of the exception therein provided for.

It is easy to determine that in a case where notice of a decision, together with a copy thereof, was personally served on the 14th of June, 1892, the time for appeal would expire on the 14th of August, following. In the case before me, such appeal was not filed or served until two days thereafter, and the first question presented by this fact is, Did the attorneys for Hunter, by acceptance of notice thereof, without objection, waive their right to afterwards move to dismiss such appeal on that ground?

This question was passed upon by the Department in the case of *Sheldon v. Warren* (6 L. D., 800). In that case, it was claimed that the parties had agreed to extend the time for appeal, and that the acceptance of notice after such time had expired, was in pursuance of such agreement. The Department held that "acknowledgment of service by opposing counsel of an appeal taken after the time allowed therefor, does not cure the defect or waive the right to have said appeal dismissed."

That attorneys have not the right to extend the time for appeal was distinctly held in the case of *Haffey v. States* (14 L. D., 423). That case also held that an attorney who had consented to delay in the taking of an appeal, could not be heard to raise the question of time, if the Department, in the exercise of its discretion, saw fit to take action on the merits of the case. In the case at bar, however, there was no consent to delay, but simply an acceptance of service of notice after the time therefor had expired. It would therefore come within the rule already quoted, from *Sheldon v. Warren*, and in said case on review (9 L. D., 668), it was held that the rules of practice limiting the time within which appeals may be taken, will, in all contest cases, be strictly enforced, in the absence of valid excuse, or circumstances calling for the exercise of supervisory authority.

In the case before me, the excuse might be held sufficient, in the absence of any adverse claim, but from the examination of the record which I have made in determining the motion to dismiss, I am convinced

that no injustice has been done by the decision already rendered in the case. There is no call, therefore, for the exercise of my supervisory authority.

In *Raven v. Gillespie* (6 L. D., 240), it was said: "On the motion of the appellee, an appeal, not filed in time, must be dismissed." Applying that rule to the case at bar, the motion before me must be granted. The appeal of Julien is accordingly dismissed.

Approved,

JOHN I. HALL,

Assistant Attorney General.

PRACTICE—APPEAL—RULES 46 AND 48.

HENNING ET AL. *v.* MORTON ET AL.

The decision of the local office becomes final as to the facts if notice of the appeal therefrom is not served on the opposite party as required by rule 46, and in such case no appeal will lie from the decision of the Commissioner affirming the action below.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (P. J. C.)

The record in this case shows that Evan Morton *et al.*, on March 12, 1890, made mineral entry No. 227 of the Troy Lode, lot No. 4925, Pueblo, Colorado, land district.

On April 30, 1890, A. H. Henning *et al.* filed a protest against the mineral entry, on the grounds that the surface ground, veins, etc., included in the Troy Lode are not the property of the applicants; that applicants have not \$500 worth of improvements on the ground; that the discovery shaft is not ten feet deep, and that it is not located on the ground; that the annual labor for the years 1888 and 1889 was not performed; that the official survey is wrong and fraudulent; that the premises are claimed and owned by protestants as the "Troy Lode Claim," by reason of a re-location of the ground under the mining laws, "and while the same was vacant mineral land." It is stated that the first notice of publication for application for patent was made September 19, 1889, and it is also shown that the re-location as the Troy by the protestants was made September 23, 1889.

On May 21, 1890, August Koppe also filed a protest, making substantially the same allegations, and claiming the ground as the Protection Lode, located January 16, 1890. By letter of September 30, 1891, your office ordered a hearing on these protests. The testimony was taken before the local officers, and as a result they found that the charges had been proved, and recommended that the mineral entry be canceled. The claimants appealed. The protestants filed a motion to dismiss the appeal, for the reason that the contestee did not comply

with Rule 46 of Practice, which requires that notice of appeal and specifications of error be served on the appellee during the time allowed for appeal. Your office, by letter of October 28, 1892, sustained the motion, under the rulings in *Bundy v. Fremont Townsite* (10 L. D., 595), and *Heitt v. Dunbar* (13 L. D., 576), but held that inasmuch as the case involves the validity of an entry, the whole record was considered in the same manner as though no appeal had been taken, and affirmed the judgment of the local office on two of the charges, to wit:—

I. Failure on the part of the applicants to expend \$500.00 in labor or improvements upon the claim as entered.

II. Failure to make the required amount of expenditures upon said Troy claim during the years 1888 and 1889, the claim having been relocated by protestants as abandoned ground.

The applicants again appealed, assigning as error in your said office decision in dismissing their appeal, and other grounds, both of law and fact. There is a motion filed to dismiss this appeal under Rule 48, Rules of Practice.

From an examination of the record I am satisfied of the correctness of your decision on the grounds specified. It is apparent also that notice of the appeal from the local office was not served, as required by Rule 46, Rules of Practice, by the applicants. Their appeal not having been taken in accordance with the rule, was a nullity; therefore, under Rule 48, *supra*, the decision of the local officers became final as to the facts, and no appeal lies from the decision of your office under such circumstances (*Grass v. Northrop*, 15 L. D., 400). The motion to dismiss the appeal is therefore sustained and your office judgment affirmed, and mineral entry of the Troy Lode will be canceled.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

COPPOCK v. TITSWORTH.

Rehearing ordered in the case above entitled, March 19, 1894. See 15 L. D., 193 and 595.

TOWNSITE PLAT—CHANGE OF SURVEY.

F. W. JONES ET AL.

The survey of a townsite, duly approved and filed in the office of the board of trustees, will not be modified in an ex parte proceeding.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (E. W.)

Your office letter of January 9, 1894, transmits the appeal of F. W. Jones *et al.* from your office decision of November 29, 1893, relative to

certain changes in the map of the townsite of Perry, Oklahoma Territory, submitted by attorneys for petitioners.

It appears that certain citizens of the town of Perry, addressed a petition to your office showing that they came into the town of Perry on the 16th of September, 1893, and settled on lots to obtain homes, which said lots are situate in block B, and appear upon the map of survey now in the office of the townsite board of Perry, as being in the street running north and south through said block B.

Petitioners further allege that said block B is laid off in a different manner from all other blocks in said city, in that the said block B has two streets, one fifty feet wide, running east and west, and one seventy-five feet wide, running north and south, through said block B. Also lots 30 and 31 facing B street, and lots 10 and 11 facing C street, being east and west of said street of seventy-five feet and are fifty feet front each, while every other business lot in Perry is twenty-five feet front only.

Petitioners allege further that when they made the run into Perry, there was nothing to show them that said block B was laid off differently from the other lots. Maps of what purported to be the official survey of said block B, were circulated and sold by the thousands, and certified to as correct by C. H. Fitch, in charge of townsite surveys of the Cherokee Outlet; that petitioners were the first occupants of three lots of twenty-five feet fronting C street, and three lots of twenty-five feet each, fronting B street, said six lots being in said street of seventy-five feet in said block B.

Petitioners were the first and only occupants of the same, which they entered in good faith and have since occupied them. Said block B being, originally intended for a park, and having been changed to a business block the reason for the existence of more than one alley no longer exists.

There is a government well in the center of said block, but the water being salt is useless. Besides the alley of fifty feet east and west gives sufficient access to said well. Petitioners pray that their rights as settlers, residents and occupants of said lots be considered and recognized, and that the survey and map be changed and corrected so as to show three lots facing C street and three lots facing B street of twenty-five feet front only.

Your office letter of November 29, 1893, in response to said petition, states,

That the said townsite of Perry having been surveyed and marked upon the ground under the authority of the President's proclamation, dated August 19, 1893, and the plat thereof duly approved and filed with the townsite board of trustees, it is not within the province of this office to authorize any change whatever on said plat of survey.

This is an *ex-parte* proceeding in view of which your office properly denied the petition, since all parties at interest should be represented

in a proceeding the object of which is to change a townsite map, duly approved and filed in the office of the board of trustees.

The petition was properly denied by your office. In addition to being an ex-parte proceeding, there is not sufficient reason presented therein for the change contemplated.

If there be a good legal reason for granting the prayer of petitioners, the city authorities and all citizens interested should be made parties, in order to consummate the same.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

JOHN MALONE ET AL.

Motion for review of departmental decision of September 30, 1893, 17 L. D., 362, denied by Secretary Smith, February 19, 1894.

RESIDENCE—LEAVE OF ABSENCE.

DAWSON v. UTLEY.

The rule that recognizes temporary absences as not interrupting the continuity of residence is only applicable where a bona fide residence has been established. Failure to apply for leave of absence cannot be excused on the ground of the claimant's ignorance of the law authorizing such action.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (J. I. P.)

On January 5, 1893, by letter "C" of that date, your office transmitted to this Department the appeal of H. M. Utley from its decision of June 2, 1892, rejecting his final proof on homestead entry No. 10715, Seattle Washington, land district, and directing that said entry stand suspended pending the showing made by the final proof of Dawson on his declaratory statement No. 12559.

Dawson filed his declaratory statement August 30, 1888, on the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 34, and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 35, T. 37 N., R. 3 E., in the above named land district. Utley made homestead entry of the same land November 19, 1888.

After posting and publication of notice as required by law, Utley made proof March 4, 1890, in support of his claim to said land, for the purpose of commuting his homestead to a cash entry.

Dawson filed a protest against the allowance of said proof, alleging prior right to said land by virtue of his previous settlement and filing thereon, and that Utley had not resided continuously on said land for six months preceding said proof.

A hearing was had on the issues thus joined, at which both parties were present in person and by attorney, and on the evidence adduced the local officers found in favor of Utley. From that decision Dawson appealed to your office, the decision of which, June 2, *supra*, reversed the decision of the local office, as above set forth.

An appeal by Utley brings the case to this Department.

The errors assigned, which are fifteen in number, may, without destroying their force, be condensed as follows—

1. Error to find that Dawson established a residence on the land in contest on October 25, 1888, or at any other time.

2. Error to find that his absence from said land from October, 1888, to December, 1889, a period of fourteen months, without permission so to do, was excusable on account of sickness and poverty.

3. That said decision is contrary to the law and the evidence.

From the evidence it is shown that Dawson, whose family at the time were in Kansas, went upon the land in question August 25, 1888, and "built a camp there and went and dug out the lines of the land—cutting timber and blazing out roads." This is his own uncontradicted testimony. How much timber he cut, or how many roads he cut out is not stated. On August 30, 1888, he filed his declaratory statement on said land. September 17, 1888, he returned to said land and employed a man by the name of Humphrey living in the vicinity to show him the northeast corner of his claim; this done, he says—"I blazed out a road to get there, and I cleared a place to put up my house, and I cut down some timber." The size of the place cleared up or the quantity of timber cut down is not stated. On that trip he had an ax with him and remained a day. He then went to work in the hop fields south of Seattle until October, 1888, he says the 25th, when he returned to the land with an ax, a tent, three blankets, and a cooking outfit, and remained, as he states, three days, living and cooking in the tent, during which time he was cutting out roads through the woods, and looking out for living water.

It appears that on this visit to the land in question, Dawson was in the company of James P. Reid and S. D. Humphrey and a man by the name of Runkles. That he spent one night with Reid, and left his house in the midst of a hard rain to go and stay on his claim; that when he was urged by Reid to remain in his house, he referred to his service in the army, and boasted of his ability to endure any degree of hardship. At this time he also spoke to both Reid and Humphrey of his financial condition. He represented himself to them as a man in affluent circumstances; that he owned teams and much other property in Kansas, which he intended to sell and apply the proceeds to the cultivation of said claim. He also told Marion C. Gray, one of the claimant's witnesses, that he had \$8000 and two span of horses, and to Charles E. Barnes, another witness, he said he had a couple of teams that he was going to

bring out there right away and show the settlers how he was going to clear up a ranch.

When he left the land after his three days' sojourn, he hired a horse and Mr. Humphrey's boy to go to Sehome, where he bought some provisions, consisting of bacon, flour, beans, and other groceries, and sent back to the land. His tent, ax, etc., were left on the claim.

This was his last appearance on the land until some time in December, 1889. About October 20, 1888, after Dawson had left the land, so Reid and Humphrey testify, a man by the name of Wiley came to the neighborhood, bearing an order, purporting to be written by Dawson on a postal card, and directing Reid to let Wiley have the tools and provisions which he, Dawson, had left on his claim.

Dawson denies the Wiley episode in toto; denies the execution of the postal card, and his son swears the signature on the postal card is not that of his father. As the evidence of Reid and Humphrey on that point is hearsay purely, and there is no direct evidence whatever to establish that fact, it must be regarded as not proven.

Reid swears that he went with Wiley to search for the tent and tools, and found them, not on the land in question, but on the adjoining claim, owned by a man by the name of Murphy; that he purchased the tent, ax, and fifteen pounds of bacon of Wiley, and afterwards sold the ax to Mr. Utley; and Humphrey swears that he got the flour, but don't remember whether he bought it from Wiley himself, or whether his son got it for taking Wiley over to Mr. Reid's and back. Wiley was not present at the hearing. He seems to have left the neighborhood in disgust soon after his appearance there, and to have not been seen by any one except Reid and Humphrey and several others, whose names are not given.

When Dawson left the land in question in October, 1888, after he left the tent, etc., there, he was taken sick with diarrhœa, which he had contracted in the army. He says he treated himself for a few days, when growing rapidly worse, he became alarmed, and started for San Francisco to see a Dr. Kirkpatrick, who had treated him in the army. By his doctor's advice he went to the mountains, at Truckee, California, where he remained from November 10, 1888, until February 3, 1889. During his stay here he was without doubt a sick man. Here he was joined by his wife and son. When able to do so, he went to Princeton, California, where he got employment, and was again joined by his wife and son, about May 1, 1889. Here he was again taken sick, and as soon as he was able, in company with his wife and son, he went to Seattle, where he arrived about September 1, 1889. After working in the hop fields south of Seattle for a while, he, on the 24th of September, 1889, went to Whatcom, a town about eleven miles from the land in question, where he says his wife started a boarding house known as the "Terminus Hotel." He lived here with his wife, waiting on the table, and performing such other duties as he could about

the place. His health at this time seems to have been poor, although he was not confined to his bed, and was around almost all the time. About the middle of December he made two or three visits to the land in question, remaining over night once and taking some provisions out there. About the 18th of December he was again taken sick and did not return to the land any more until about the 10th of February, 1890, when, with the assistance of two or three men, he built a house twelve by sixteen feet, and slashed about one and one-half acres. This house was built of ordinary "shakes;" had a place for two slide windows; had some shakes nailed to two cross pieces, stood up against an opening, for a door; there was no furniture in the house, and no stove or fireplace, the only place for a fire being where no floor had been built, so that the fire might be built on the ground, and the smoke allowed to escape through the cracks between the boards.

It is shown that the house was not inhabitable during all seasons of the year; that Dawson only paid occasional visits to it; that his family has never been with him on the land, but have maintained their residence at Whatcom in the boarding house there.

It is further shown that Dawson's improvements, viz: the slashing and house, were made after Utley had given notice of his intention to offer his final proof, said notice having been dated December 18, 1889, and published from January 3 to February 7, 1890, and were of the value of about \$90.

When Utley entered the land in November, 1888, he built him a house, and established his residence therein, and has continued to reside there ever since, with the exception of a few days at a time, when he was working for his neighbors in the vicinity, to earn money with which to improve the land. He has about five acres cleared and seeded to grass, garden, and other improvements, all valued at about \$350.

It is further shown that at the time Utley entered the land and Dawson started on his travels for the benefit of his health, the land in question was worth about \$2 per acre, and that at the time Utley gave notice of his intention to offer his final proof and Dawson re-established his claim to the land, it was worth from \$20 to \$25 per acre; the increase in value being caused by the location of a railroad in the vicinity of the land.

Dawson denies the making of any statements concerning his financial condition. Both those statements are testified to by Reid, Humphrey, Gray and Barnes.

Unquestionably the preponderance of the testimony on that proposition is against Dawson, and the local officers before whom the evidence was taken and the witnesses appeared, seem to have so viewed it.

In the light of the facts narrated herein, I am unable to concur in the opinion of your office that Dawson has in good faith complied with the requirements of the pre-emption laws. That law required the

establishing of residence on the land sought to be acquired, and in order to show good faith it must be a home to the exclusion of one elsewhere. Samuel C. Haver (11 L. D., 450); Gibbs v. Kenny (16 L. D., 22), and authorities there cited.

Dawson's temporary stay for three days on the land in a tent, his failure to visit the land for three months after he came to Whatcom, and the building of a house sixteen months after his alleged settlement, which was only habitable at certain seasons of the year, in which he only stayed for a brief time at intervals, while maintaining his residence with his family at Whatcom, will hardly fill the requirement of a home on the land to the exclusion of one elsewhere.

It will be granted, for the sake of argument, that Dawson's absence from the land from October, 1888, to December, 1889, was caused by sickness. It will also be admitted that when residence is once established, temporary absences, on account of sickness, business, etc., will not interfere with the continuity of that residence. Hilton v. Skelton (11 L. D., 505); Platt *et al.*, v. Graham (7 L. D., 249); Francis M. Wood (7 L. D., 345); Mary E. Bailiff (7 L. D., 170). But that rule does not apply here, for the reason that a *bona fide* residence has never been established on this land by Dawson, and his absence was more than temporary. The claim of Dawson to having established a *bona fide* residence on this land, is not compatible with the maintenance of a home in the boarding house at Whatcom. Huck v. The Heirs of Medler (7 L. D., 267).

An absence after residence is established for not exceeding a year from the land may be granted because of sickness, on application and proper showing to the local office. Act of March 2, 1889 (25 Stat., 854). It is true this law was not in effect when Dawson left the land, but it was six months before his return to Whatcom, and the use of the mails was not prohibited. But in this case no application was made until the hearing was held, and hence the absence was unauthorized. Failure to make the application because of ignorance of the law, is not a sufficient excuse to cure Dawson's laches in that respect. Every man is presumed to know the law, and ignorance of its provisions does not exempt from the effect of its operation.

When more than a year had elapsed from the time of Dawson's departure from the land without his return thereto, or any exercise of ownership or assertion of his claim, and in the absence of any application for leave of absence, as provided by law, Utley had a right to believe, whatever knowledge he may have had of Dawson's claim at the time he made his homestead entry, that he had abandoned the land, and hence his offer to prove up and commute his homestead to a cash entry.

Dawson's absence might not have operated to the prejudice of his claim, had he returned before any adverse right attached. Dayton v. Dayton (11 L. D., 307). But this he failed to do.

For the reasons herein stated, I am of the opinion that Utley's claim to the land in question is paramount to that of Dawson. Your decision is therefore reversed, with instructions to direct the local office to dismiss the protest of Dawson and approve the final proof of Utley.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

PRACTICE—NOTICE OF DECISION.

UNITED STATES *v.* DANA.

In the absence of a showing of fraud, an entryman will not be heard to allege his failure to receive notice of a decision holding his entry for cancellation, where such failure is due to his own negligence and the rights of a third party have intervened.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (G. B. G.)

On October 28, 1891, your office, upon a report by Special Agent G. C. Wells, held for cancellation Loren C. Dana's timber culture entry No. 2061, for the SW. $\frac{1}{4}$ of Sec. 23, T. 12 S., R. 64 W., of the Pueblo land district, Colorado.

On November 5, 1891, the local officers mailed by registered letter copy of your office letter holding said entry for cancellation; to claimant at Summit Park, Colorado, his last known address. The grounds upon which said entry was held for cancellation were set forth at length in this letter, and claimant was advised therein that he would be allowed sixty days in which to apply for a hearing to show cause why his entry should be sustained, and that if he failed to show cause why it should be sustained, the same would be finally canceled.

On January 22, 1892, said entry was canceled, and on March 24, 1892, John F. Davenport made homestead entry No. 7257 for said tract.

On July 27, 1892, the said Dana made application for reinstatement of his entry, which application was denied by your office decision of October 13, 1892, from which decision the said Dana has appealed.

Dana alleges under oath, in his application for reinstatement of his entry, that he never received any notice whatever, either official or otherwise, that his said entry was held for cancellation, or that the same was in any wise in jeopardy until long after the entry was canceled.

In this allegation he is corroborated by the record in so far as it applies to official notification, the aforesaid registered letter having been returned to the local office unclaimed.

He alleges further, generally and specifically, that he has in all respects complied with the timber culture laws in the cultivation of his claim, and in this statement is corroborated by the affidavits of two

witnesses, filed as part of his application, who state that they know of their own personal knowledge that the said Dana's statements are true.

The record raises only one question to be passed on by the Department.

Was the timber culture entryman notified of the decision of your office that his entry of the land in controversy was held for cancellation.

As a matter of fact, as has already been shown, he had no official notification, and there is an irresistible presumption raised by the record that the entryman knew nothing of the proceedings attacking the integrity of his entry until long after it had been canceled, and the land homesteaded by another, and it remains only to be seen whether the proceedings under the letter of the law, were in all respects regular.

In the circular of July 31, 1885, (4 L. D., 503) as amended May 24, 1886, (id., 545), it is provided that

Hereafter, when an entry is so held for cancellation, the claimant will be allowed sixty days after due notice in which to apply for a hearing, to show cause why the entry should be sustained.

In the same circular it is further provided that

Notice to claimants will be sent by registered letter to their last known post office address, and the return letter receipt (or returned letter) will be transmitted to this office with register's and receiver's report.

Notice will also be served personally, if claimant can be reached, and registers and receivers and special agents will take every precaution to see that notice reaches the party or his attorney, and to preserve and transmit the evidence of service, or of an attempt to procure service.

It cannot be held that notice by registered letter does not operate as notice in the absence of fraud, where said notice was not in fact received. Such a holding would render it in many instances impossible to secure the cancellation of entries because the whereabouts of the entryman may be unknown, and in many instances impossible of discovery, and to so hold would be to withhold a part of the public domain from entry for an indefinite length of time. That the party to be notified by registered letter would not always receive the same, was contemplated by the circular above quoted, inasmuch as said circular provides that the return letter receipt (*or returned letter*) shall be returned to the General Land Office and it nowhere provides for further attempt at service after such return has been made.

That part of the circular quoted, which provides that notice will be served personally, if claimant can be reached, and enjoining on registers and receivers and special agents that they shall take every precaution to see that notice reaches the party or his attorney, is merely directory, and is not a limitation on the manner of notice, as therein before provided.

Where the universality of this rule makes it deficient in equitable application to individual cases, the supervisory power of the Secretary may be invoked to prevent a wrong, but in the case at bar the interven-

ing equity of the homestead entryman must not be lost sight of, in the contemplation of the wrongs of the claimant.

Where equities are equal, the law must prevail.

There is no evidence in the application of Dana that he had ever advised either the postmaster at Summit Park, or the local officers of the land district in which this land is situated, of his change of residence. Had he done either, such precaution, it is altogether probable, would have protected him fully. That he did not do either or both of these things, is his own laches, and in the absence of a showing of fraud, he will not be heard to complain under such circumstances that he did not receive notice when the rights of a third party have intervened.

The judgment of your office is concurred in, and the same is hereby approved and affirmed.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

RAILROAD GRANT—INDEMNITY SELECTION—APPLICATION.

NORTHERN PACIFIC R. R. CO. *v.* HUNT.

An application to enter, under which no rights can be acquired, properly rejected and pending on appeal, will not defeat a subsequent indemnity selection.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (F. W. C.)

I have considered the appeal by the Northern Pacific R. R. Company from your office decision of October 5, 1888, holding for cancellation its indemnity selection of the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 27, T. 17 N., R. 44 E., Spokane Falls land district, Washington.

The company made selection of this land March 20, 1884, and your decision rests upon the ground that prior thereto, to wit, on January 7, 1884, one Doctor F. Hunt had applied to enter this land under the provisions of the act of March 3, 1875 (18 Stat., 519), and appealed from the rejection of his application, which appeal was pending undisposed of at the date of the company's selection.

Said act of March 3, 1875 (*supra*), provided for an additional right of entry, where a person had paid \$2.50 per acre for lands within the limits of a railroad grant, which grant was afterwards forfeited, of an equal amount of land to be located in lieu of the excess over \$1.25 per acre.

Hunt made purchase under the pre-emption act of one hundred and sixty acres in section 22, T. 17 N., R. 44 E., Washington, and based his claim to the land in question under said purchase.

The grant for the portion of the road opposite which the purchase was made, has never been forfeited, hence, there never was any right

of entry in Hunt under said act of March 3, 1875; further, said act was repealed by the act of January 31, 1885 (23 Stat., 296).

Your decision appealed from held that Hunt had no right of entry and that his application was properly rejected, and from said decision it is presumed he failed to appeal, as there is no reference in the record forwarded of an appeal by Hunt.

The action rejecting Hunt's application was proper, and by said application no rights were acquired either against the United States or the company.

Your decision holds that the appeal by Hunt from the action of the local officers, in rejecting his application, which action you sustain, was a bar to the company's selection, and the case of *Jos. D. Evans v. Northern Pacific R. R. Company* (7 L. D., 244), is referred to.

In that case Evans applied before the company selected the land, and his application was *erroneously* rejected, and for that reason he was protected in his rights under his prior assertion of claim and the company's selection, subsequently allowed, canceled.

In the present case there was no right in Hunt to make entry as claimed, and his application and appeal, under these circumstances, did not serve to defeat the company's claim under a selection subsequently made. Said selection will therefore be allowed to stand, if no other reason appears for denying the same.

Your office decision is accordingly reversed.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

SEXON v. JONES ET AL.

A pre-emption entry made by a settler that removes from land of his own to reside on the public land is confirmed by the proviso to section 7, act of March 3, 1891, if otherwise within the terms of said section.

An entry that is susceptible of confirmation under the body of section 7 of said act, and is also within the confirmatory provisions of the proviso to said section should be adjudicated under the proviso.

Secretary Smith to the Commissioner of the General Land Office, February 19, 1894. (J. L. McC.)

On July 12, 1886, William Jones filed pre-emption declaratory statement for the NW. $\frac{1}{4}$ of Sec. 24, T. 10 N., R. 39 W., North Platte land district, Nebraska.

On May 19, 1887, he made final proof and cash payment, and received final certificate for the tract.

On August 5, 1889, Edward H. Sexon initiated contest against the entry, alleging that the defendant had removed from land of his own, upon which he was at the time residing, to the tract in question.

A hearing was had, as the result of which the local officers found that, at the time of making said filing—

He resided upon agricultural land of his own in this State, and that he removed from land of his own to the tract in controversy, and that such settlement and filing were contrary to law. We further find that the claimant, Jones, made final pre-emption cash entry more than two years prior to the inception of this contest, and had mortgaged said tract to the Lombard Investment Company for a valuable consideration; that while the pre-emption of this tract and making final proof thereon by Jones was fraudulent, we believe that the act of March 3, 1891, covers this case. We are therefore of the opinion that this contest should be dismissed, and the entry passed for patent.

Contestant appealed. On July 14, 1891, your office affirmed the judgment of the local officers, and held that—

Inasmuch as said company became an incumbrancer of said tract prior to March 1, 1888, and since it is shown that the incumbrance was in good faith on the part of said company, and since it is shown by the record that no adverse claim originated prior to date of said final entry, I am satisfied that this entry is protected by said section and should pass to patent.

From said decision of your office the contestant appealed to the Department; but subsequently he withdrew his appeal and requested the dismissal of all proceedings against said entry.

The question arises as to the effect of said withdrawal of appeal.

The Department has held that

a pre-emption entry made by a settler that removes from land of his own to reside on the public land is confirmed by the proviso to Sec. 7, act of March 3, 1891, in the absence of any pending protest or contest, and where no proceedings have been initiated against such entry within two years from the issuance of the receiver's receipt. *Joseph X. Yocum, syllabus* (16 L. D., 467.)

In the case at bar, no proceedings were initiated against the entry within two years from the issuance of the receiver's receipt; there is now no pending protest or contest; it is therefore in my opinion susceptible of confirmation under the proviso to said section seven.

Your office decision holds "that this is protected by said section and should pass to patent"—because "said company became an incumbrancer of said tract prior to March 1, 1888." But the Department has further held that

an entry that is susceptible of confirmation, under section seven, act of March 3, 1891, and is also within the confirmatory provisions of the proviso to said section, should be adjudicated under the proviso. (*Samuel M. Mitchell et al.*, 13 L. D., 55).

While Sexon's contest was pending, the entry was susceptible of confirmation under the body of the act (*Witcher v. Conklin*, 14 L. D., 349), and not under the proviso (*Coon v. Simmons*, 12 L. D., 459). But now that the contest has been withdrawn, as the entry can be confirmed under the proviso to said section, in my opinion it should be so confirmed, irrespective of the transferee.

Your office decision, while correct under the circumstances as they existed at the date when it was rendered, is therefore—in view of the contestant's withdrawal of his appeal—modified as herein indicated, and you will pass the entry to patent.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

KLAMATH RIVER INDIAN RESERVATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., February 20, 1894.

REGISTER AND RECEIVER,

Humboldt, California.

GENTLEMEN: I enclose herewith a printed copy of the act of Congress approved June 17, 1892 (27 Stat., 52) entitled "An act to provide for the disposition and sale of lands known as the Klamath River Indian Reservation."

I also inclose a descriptive list of the lands which are declared to be subject to settlement, entry and purchase under the laws of the United States granting homestead rights, and authorizing the sale of mineral, stone, and timber lands.

The law provides that any person entitled to the benefits of the homestead laws of the United States who has in good faith, prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor; and in case of conflicting claims between settlers the land shall be awarded to the settler first in order of time; provided, that any portion of said land more valuable for the mineral deposits than for agricultural purposes, or for its timber, shall be entered only under the law authorizing the entry and sale of timber or mineral lands; and provided further, that the heirs of any deceased settler shall succeed to the rights of such settler under this act.

On receipt of this letter, you will cause a notice to be published in some newspaper of general circulation in the vicinity of the land, giv-

ing the date on which you will receive applications for these lands, which date must be after thirty days from first publication, and at the expiration of said notice forward a copy of the newspaper containing the same to this office.

You will in each case require the applicant who claims settlement prior to the passage of the act to submit proof to consist of his affidavit corroborated by the affidavits of two disinterested witnesses, to show that he is an actual settler on the tract applied for, and that there is no other party having a superior right to it as a prior settler thereon. It will also be necessary for each settler to furnish a non-mineral affidavit (form 4-062) and to show that the land is more valuable for agricultural purposes than for its timber or stone. If such proof is satisfactory you will allow the settler, whose application is filed within three months after the date fixed in the published notice, to elect whether he will make homestead entry for the tract applied for, which must form a compact body not exceeding one hundred and sixty acres, or whether he will pay cash for the same. If he elects to pay cash, issue the entry papers therefor as in ordinary cash entries, numbering them consecutively in the order of their issue, beginning with number one, reporting them in special abstracts with your regular monthly returns.

On the margin of the certificate of purchase, the register will note the words "Klamath River Indian Reservation, act of June 17, 1892".

When entries are made for any of these lands under the homestead, timber and stone, or mineral laws, a separate series will be kept of each class, beginning with number one, and report them in separate and special abstracts, the register noting on the homestead application, or on the cash certificate, as the case may be, the words "Klamath River Indian Reservation, act of June 17, 1892".

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,
HOKE SMITH,
Secretary.

PRACTICE—CONTEST CASES—EX PARTE STATEMENTS.

POTTER *v.* LAWRENCE.

Papers containing ex parte statements or arguments relative to contest cases should not be filed therein if they do not bear evidence of service on the opposite party.

First Assistant Secretary Sims to the Commissioner of the General Land Office, February 20, 1894.

I have at hand your letter of the 15th instant enclosing a letter addressed to yourself by John G. Potter, Garfield, Washington, relating to the contest case of J. G. Potter *v.* Perry W. Lawrence, Spokane

district, Washington, pending before the Department on appeal by Potter from your decision of July 7, 1893.

This letter, marked "personal" on the envelope addressed to you, contains a number of ex-parte statements relative to the case. It should be returned to the writer and his attention called to the fact that the rules of practice require that all papers containing statements or arguments filed in contest cases should bear the evidence of service on the opposite party.

Papers like the above, which is returned herewith, should not in future be submitted to the Department in the absence of the required evidence of service.

RIGHT OF WAY—CANALS, DITCHES AND RESERVOIRS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
Washington, February 20, 1894.

Sections 18, 19, 20, and 21, of the act of Congress approved March 3, 1891 (26 Stat., 1095), entitled, "An act to repeal timber-culture laws, and for other purposes," grant the right of way through the public lands and reservations of the United States for the use of canals, ditches, and reservoirs, heretofore or hereafter constructed by corporations, individuals, or associations of individuals, upon the filing and approval of the certificates and maps therein provided for; but the word "reservations" as here used does not include Indian reservations.

When the right of way is upon a reservation not within the jurisdiction of the Interior Department, the application must be filed in accordance with these regulations, and it will be submitted to the department having jurisdiction. A map and field notes of the portion within such reservation must be submitted, in addition to the duplicates required herein. This map and field notes must conform to all the provisions of this circular. The local officers will forward them to this office with the application.

The word "adjacent," as used in section 18 of the act, in connection with the right to take material for construction from the public lands, is defined by the department as including the tier of sections through which the right of way extends, and perhaps an additional tier of sections on either side (14 L. D., 117). The right extends only to construction, and no public timber or material may be taken or used for repair or improvements (14 L. D., 566). These decisions were rendered under the railroad right of way act, and are applied to this, as the words are the same in both.

The sections above noted read as follows:

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the pur-

pose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in the cases of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal or ditch shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

1. This act is evidently designed to encourage the much needed work of constructing ditches, canals and reservoirs in the arid portion of the country by granting a right of way over the public lands necessary to the maintenance and use of the same.

The 18th section of the act in question provides that—

The privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under the authority of the respective States or Territories.

The control of the flow and use of the water is therefore a matter exclusively under State or Territorial control, the matter of adminis-

tration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over the public lands.

In submitting maps for approval under this act, however, which in anywise appropriate natural sources of water supply, such as the damming of rivers or the appropriation of lakes, such maps should be accompanied by proof that the plans and purpose of the projectors have been regularly submitted and approved in accordance with the local laws or customs governing the use of water in the State or Territory in which the same is located.

No general rule can be adopted in regard to this matter. Each case must rest upon the showing filed in support thereof.

The previous holding of this Department, expressed in the circular approved March 21, 1892, as follows, viz.: (1020338)

This act does not contemplate the appropriation, for reservoir purposes of natural lakes that are already the source of water supply; nor the damming of rivers, so that the adjacent country is overflowed

is hereby overruled and set aside.

2. By section 21 of the act above quoted, it will be seen that the approval of a map of a canal, ditch, or reservoir does not necessarily carry with it the right to the land fifty feet on each side, the approval of the Department granting only such right of way as the law provides. The width necessary for construction, maintenance, and care of a canal, ditch, or reservoir is not determined.

3. All persons settling on public lands to which right of way has attached for a canal, ditch, or reservoir take the same, subject to such right of way, and at the full area of the subdivision entered, there being no authority to make deduction in such cases.

4. Canals, ditches, or reservoirs lying partly upon unsurveyed land can be approved if the application and accompanying maps and papers conform to these regulations, but the approval will only relate to that portion traversing the surveyed lands.

5. Any incorporated company desiring to obtain the benefits of the law is required to file the following papers and maps with the register of the land district, in which the canal, ditch, or reservoir is to be located, who will forward them to the General Land Office, where, after examination, they will be submitted to the Secretary of the Interior, with recommendation as to their approval.

First. A copy of its articles of incorporation, duly certified to by the proper officer of the company, under its corporate seal.

Second. A copy of the State or Territorial law under which the company was organized (when organized under State or Territorial law), with certificate of the governor or secretary of the State or Territory that the same is the existing law. See *eleventh* subdivision of this paragraph.

Third. When said law directs that the articles of association, or other papers connected with the organization, be filed with any State or Ter-

ritorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

Fourth. When a company is operating in a State or Territory other than that in which it is incorporated, the certificate of the proper officer of the State or Territory is required that it has complied with the laws of that State or Territory governing foreign corporations, to the extent required to entitle the company to operate in such State or Territory.

No forms are prescribed for the above portion of the "due proofs" required, as each case must be governed, to some extent, by the laws of the State or Territory.

Fifth. The official statement, under the seal of the company, of the proper officer, that the organization has been completed; that the company is fully authorized to proceed with construction according to the existing law of the State or Territory; and that the copy of the articles filed is true and correct. (See form 1.)

Sixth. A true list, signed by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (See form 2.)

Seventh. A copy of the company's title or right to appropriate the water needed for its canals, ditches, and reservoirs, certified as required by the State or Territorial laws. If the miner's inch is the unit used in such title, its equivalent in cubic feet per second must be stated.

Eighth. A copy of the State or Territorial laws governing water rights and irrigation; with the certificate of the governor or secretary of the State or Territory, that the same is the existing law. See *eleventh* subdivision of this paragraph.

Ninth. A statement of the amount of water flowing in the stream supplying the canal, ditch, or reservoir, at the point of diversion or damming, during the preceding year or years. For this purpose, it will be necessary to give the maximum, minimum, and average monthly flow in cubic feet per second; and the average annual flow. All available data as to the flow is required. The method of measurement or estimate by which these results have been obtained must be fully stated.

Tenth. Maps, field notes, and other papers, as hereinafter required.

Eleventh. If certified copies of the existing laws regarding corporations and irrigation, and of new laws as passed from time to time, be forwarded to this office by the Governor of the State or Territory, the applicant may file, in lieu of the requirements of the second and eighth subdivisions of this paragraph, a certificate of the governor or secretary of state that no change has been made since a given date, not later than that of the laws last forwarded.

6. Individuals or associations of individuals, making applications for right of way, are required to file the information called for in the *seventh, eighth, ninth, and tenth* sections of the previous paragraph. Associations of individuals must, in addition, file their articles of asso-

ciation; if there be none, the fact must be stated over the signature of each member of the association.

7. The maps filed must be drawn on tracing linen, in duplicate; and must be strictly conformable to the field notes of the survey thereof. The maps should show other canals, ditches, laterals, or reservoirs, with which connections are made; but all such canals, reservoirs, etc., with which connection is made, must be represented in ink of a different color from that used in drawing those for which the applicant asks right of way.

8. Field notes of the surveys must be filed in duplicate, giving, in addition to the ordinary records of surveys, the data called for in this, and in the following paragraphs. They should state which line of the canal was run, whether middle or side line. The stations or courses should be numbered in the field notes, and on the map. The record should be so complete that from it, the surveys could be accurately retraced by a competent surveyor with proper instruments. The field notes should show whether the lines were run on the true or the magnetic bearings; and, in the latter case, the variation of the needle and date of determination must be stated. The kind and size of the instrument used in running the lines, and its minimum reading on the horizontal circle should be noted. The line of survey should be that of the actual location of the proposed ditch, and as exactly as possible, the water line of the proposed reservoir. The method of running the grade lines of canals, and the water lines of reservoirs, must be described.

9. The scale of the map should be 2,000 feet to an inch in the case of canals or ditches; and 1,000 feet to an inch in the case of reservoirs. The maps may, however, be drawn to a larger scale, when needed to properly show the proposed works; but the scale must not be so greatly increased as to make the map inconveniently large for handling.

10. All subdivisions of the public surveys represented on the map should have their entire boundaries drawn; and on all lands affected by the right of way, must be shown the smallest legal subdivisions, (forty-acre tracts and lots).

11. The applicant should mark each of the subdivisions affected by the right of way "V" or "vacant", if it belongs to the public domain at the time of filing the map in the local land office; and the same must be verified by the certificate of the register. If it does not affirmatively appear that some portion of the public land is affected, the local officers will refuse to receive the maps.

12. The termini of a canal, ditch, or lateral, should be fixed by reference to the nearest existing corner of the public survey. The initial point of the survey of a reservoir should be fixed by reference to the nearest existing corner outside the reservoir, by a line which does not cross an area that will be covered with water when the reservoir is in

use. The map, field notes, engineer's affidavit, and applicant's certificate (Forms 3 and 4) should each show these connections.

13. When either terminal of a canal, ditch, or lateral is upon unsurveyed land, it must be connected by traverse with an established corner of the public survey, if not more than six miles distant from it, and the single bearing and distance from the terminal point to the corner, computed and noted on the map in the engineer's affidavit, and in the applicant's certificate (Forms 3 and 4). The notes and all data for the computation of the traverse must be given in the field notes.

14. When the distance to an established corner of the public survey is more than six miles, this connection will be made with a natural object or a permanent monument which can be readily found and recognized, and which will fix and perpetuate the position of the terminal point. The map must show the position of such marks and course and distance to the terminus. The field notes must give an accurate description of the mark and full data of the traverse as required above. The engineer's affidavit and applicant's certificate (Forms 3 and 4), must state the connections. These monuments are of great importance.

15. When a canal, ditch, or lateral lies partly on unsurveyed land, each portion lying within surveyed and unsurveyed land will be separately stated in the field notes, and in forms 3 and 4, by connections of termini, length and width as though each portion were independent. See paragraphs 12, 13, and 14.

16. When a reservoir lies partly on unsurveyed land, its initial point must be noted, as required for the termini of ditches in paragraph 12, and so that the reference line will not cross an area that will be covered with water when the reservoir is in use. The areas of the several parts lying on surveyed and unsurveyed land must be separately noted on the map, in the field notes, and in forms 3 and 4.

17. Maps showing canals, ditches, or reservoirs wholly upon unsurveyed lands may be received and placed on file in the General Land Office, and the local land office of the district in which the same occurs, for general information, and the date of filing will be noted thereon; but the same will not be submitted to, nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps will not dispense with the filing of maps after the survey of the lands and within the time limited in the act granting the right of way, which map if in all respects regular when filed, will receive the Secretary's approval.

18. In filing such maps the initial and terminal points will be fixed, as indicated in paragraphs 13 and 14.

19. Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner should be ascertained and noted. In the case of a reservoir, the distance must

not be measured across an area which will be covered with water when the reservoir is in use; and permanent monuments must be set on the water line of the reservoir at the intersection of these lines of public survey. The map of the canal, ditch, or reservoir must show these distances and marks, and the field notes must give the points of intersection and the distances, and describe the marks. When corners are destroyed by the canal or reservoir proceed as directed in paragraphs 22 and 23.

20. The map must bear a statement of the width of each canal, ditch or lateral, at high water line; if not of uniform width, the limits of the deviations from it must be clearly defined on the map; the field notes should record the changes in such a manner as to admit of exact location on the ground. The map must show the source of water supply.

21. In applications for right of way for a reservoir, the capacity of the reservoir must be stated on the map in acre-feet (i. e., the number of acres that will be covered one foot in depth by the water it will hold; one acre-foot is 43,560 cubic feet). The map must show the source of water supply for the reservoir and the height of the dam.

22. Whenever a corner of the public survey will be covered by earth or water, or otherwise rendered useless, marked monuments, (one on each side of destroyed corner) must be set on each township or section line passing through, or one on each line terminating at said corner. These monuments must comply with the requirements for witness corners of the "Manual of Surveying Instructions" issued by this office (P. 31, Ed. 1890), and must be at such distance from the works as to be safe from interference during the construction and operation of the same. In the case of reservoirs these monuments are additional to those required in paragraph 19. In case two or more consecutive corners on the same line are destroyed, the monument shall be set as required in the Manual for the nearest corner on that line to be covered.

23. The line, on which such a monument is set, will be determined by running a random line from the corner to be destroyed to the first existing corner on the line to be marked by the monument, setting on the random line a temporary mark at the distance of the proposed monument; if the random line strikes the corner run to, the monument will be established at the place marked; if the random line passes to one side of the corner, the north and south, or east and west distance to it, will be measured and the true course calculated; the proper correction of the temporary mark will then be computed, and a permanent monument set in the proper place. The field notes for the surveys establishing the monuments must be in duplicate, and separate from those of the canal or reservoir, being certified by the surveyor under oath. They must comply with the form for field notes prescribed in the "Manual of Surveying Instructions" issued by this office. When application is made for a canal or reservoir which is constructed and in operation, the method to be adopted in setting the monuments,

being governed by the special features of each case, must be left to the judgment of the surveyor. No field notes will be accepted, unless the lines on which the monuments are set, conform to the lines shown by the field notes of the survey as made originally under the direction of this office, and unless the notes are in such form that the computation can be verified, and the lines retraced on the ground.

24. The engineer's affidavit and applicant's certificate must both designate by termini (as in paragraphs 12 to 17 inclusive), and length, each canal, ditch or lateral, and initial point and area, each reservoir, shown on the map, for which right of way is asked. This affidavit and this certificate (changed where necessary, when an application is made by an individual, or association of individuals), must be written on the map and duplicate; see forms 3 and 4, pages 21 and 22. No changes are allowable in the substance of these forms, except when the facts differ from those assumed in the forms.

25. When the maps are filed, the local officers will note in pencil on the tract books opposite each tract traversed that right of way for a canal (or reservoir) is pending, giving date of filing and name of applicant; noting on each map the date of filing, transmitting them promptly to the General Land Office.

26. Upon approval of a map of location by the Secretary of the Interior, the duplicate copy will be sent to the local officers, who will mark upon the township plats the lines of the canals, ditches, or reservoirs as laid down on the map. They will also note, in pencil, on the tract books, opposite each tract of public land, that the same is to be disposed of subject to the right of way for the canal, ditch, or reservoir. Thereafter, in disposing of such lands, the claim to which shall have been initiated subsequent to the date of approval of the map, the register and receiver will note, in red ink, across the face of the certificate issued upon any entry made, that the same is allowed subject to the right of way of the canal, ditch or reservoir, giving its name, and refer to the letter from this office transmitting the map, by its initial and date.

27. When the canal, ditch or reservoir is constructed, an affidavit of the engineer and certificate of the applicant, Forms 5 and 6 must be filed in the local office in duplicate for transmission to this office. In case of deviations from the map previously approved, there must be filed new maps, and field notes in full as herein provided, bearing Forms 5 and 6 changed to agree with the facts of the case.

28. The duty of this office in examining the maps and papers of these applications, is to ascertain whether the provisions of the act of Congress are properly complied with, whether the proposed works are described in such a manner that the benefits to be granted by the approval of the Secretary of the Interior are defined so as to avoid future uncertainty, and whether the rights of other grantees of the

government are properly protected from interference. The above regulations are made for these purposes.

29. The widely different conditions to be considered in the operations proposed by the applicants, make it impossible to formulate regulations that will furnish this office with the data necessary in all cases. This office will, therefore, call for additional information whenever necessary for the proper consideration of any particular case.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,
HOKE SMITH,
Secretary.

APPEAL—SETTLEMENT—RAILROAD LANDS.

TELFORD ET AL. *v.* KEYSTONE LUMBER CO.

A motion to dismiss an appeal, for want of notice thereof, will not be sustained on behalf of a protestant that is represented by an attorney who appears for other protestants, equally interested in the same matter, who do not deny due notice of the appeal.

Settlement on land previously withdrawn for the benefit of a railroad company, in violation of an order expressly prohibiting such settlement until the formal opening of said lands thereto, confers no right that can be asserted as against the right of purchase accorded under the body of section 5, act of March 3, 1887. The sale of the standing timber on land by a railroad company is a sale of an interest in the land, and the purchaser of such interest (the substantial value of the fee) is entitled thereby to acquire the entire title to such land by paying the government price therefor, as provided by section 5, act of March 3, 1891.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1894. (F. L. C.)

I have considered the case of Thomas Telford *et al. v.* Keystone Lumber Company, involving certain lands in the Ashland district, in the State of Wisconsin, on appeal by said company from your office decision of March 22, 1893, adhered to on review October 3, 1893.

Reference is made to said decisions for a detailed description of the lands. They are in odd numbered sections in townships 46, 47 and 48 N., range 4 W., within the indemnity limits of the grant of June 3, 1856 (11 Stat., 20), to the State of Wisconsin to aid in the construction of what is now known as the Chicago, St. Paul, Minneapolis and Omaha Railway (Bayfield branch), and also within the place limits of the grant of May 5, 1864 (13 Stat., 66), to said State for the benefit of the Wisconsin Central Railroad.

Dispute arose between the companies with regard to the lands in these overlapping limits, which was finally amicably settled by agree-

ment *inter partes* and partition, under which the lands here in question were treated as belonging to the Wisconsin Central Company. This was in February, 1884, and later in the same month the State, as the original grantee from the government, issued patent to the Central Company for said lands.

May 13, 1885, the Wisconsin Central Railroad Company executed an instrument, termed by its caption "Timber license No. 356," under and by virtue of which it sold to the Superior Lumber Company the standing pine timber on the lands in question, with others, for a named consideration of \$20,954.22. Said instrument, after naming the consideration, contains words as follows:

Has bargained and sold, and by these presents does bargain, sell, grant and convey to said Superior Lumber Company the right to cut and remove for his own use during the period of twenty years all the pine timber standing and being on the following described premises, etc.

Then follows language which—

Licenses said party of the second part to enter upon said premises during the period of twenty years from the date hereof, for the purpose of cutting and removing said timber and to make such logging roads as may be necessary in order to remove said timber. But this license shall not justify any unnecessary injury to other timber, nor authorize any fences, buildings or other structures that now are or may hereafter be put on said premises by said company, its agents or assigns, to be in any way injured or interfered with. To have and to hold the same for twenty years as aforesaid, to the use and benefit of said party of the second part, his executors, administrators and assigns.

But it is hereby agreed that time is of the essence of this contract, and it is also agreed, as an express condition precedent to said sale and license, that said party of the second part hereby covenants that it will pay, when and as the same become due or payable, all taxes and assessments of every kind whatsoever which shall hereafter be assessed or otherwise imposed upon said premises during said twenty years, unless and until said party of the second part shall sooner in writing notify said company that said timber has been all removed from said premises, and that and breach or failure to perform this agreement shall, without any action taken in reference thereto, by or on the part of said company, its successors or agents, be deemed to be a surrender by said Superior Lumber Company of all its rights, whether at law or in equity, under this agreement, and to be a cancellation thereof.

It is further agreed that all timber not removed from said premises during said period of twenty years shall, upon its expiration be and remain the property of said Wisconsin Central Railroad Company, its successors and assigns, as fully as if this instrument had never been executed.

I have thus fully quoted from the instrument because its character and legal effect will have much to do with the conclusion to be arrived at herein. Whatever passed by said instrument is now by transfer in the Keystone Lumber Company, which purchased in 1889.

January 24, 1890, my predecessor, Secretary Noble, rendered a decision (10 L. D., 63), the effect of which was a holding that the lands in the case here at bar did not pass under the grant of 1864, made for the benefit of the Wisconsin Central road, because previously withdrawn as within the indemnity limits of the grant of 1856, for the benefit of

the Omaha Company. On motion for review, said judgment was, by decision of December 10, 1890, adhered to (11 L. D., 615).

Thereupon, the Keystone Lumber Company, in January, 1891, filed its application in due form to purchase the lands here involved (about 6,000 acres), under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556), and tendered the government price (\$2.50 per acre) in payment therefor.

Pursuant to the published notice of the application to thus purchase, Thomas Telford *et al.* appeared and protested, averring that there was in the company no right of purchase under the act of 1887, and further that they, said protestants, are settlers upon said lands, and claim the privilege of entering the same. Their settlements appear to have been made in the autumn and winter of 1890, and in the early part of 1891.

The lands were formally opened to settlement and entry November 2, 1891 (Newell *v.* Hussey, 16 L. D., 302). They were therefore not open to settlement at the dates when the protestants went on them, and no rights were acquired by such settlements, certainly none which could affect or disturb any right of purchase under the 5th section of the act of 1887. (Newell *v.* Hussey, *supra*, and cases cited therein.)

In this connection, I note a motion filed in behalf of William A. Pridmore, one of the protestants, asking the dismissal of the appeal of the Keystone Lumber Company, in so far as it involves land (described in your office decision) upon which he claims settlement. This he does on the ground of want of notice of the appeal. I am not disposed to attach much importance to said motion. Pridmore is a mere protestant, whose rights, whatever they may be, are subordinate to any valid right of purchase under the act of 1887, and, as the validity of the right of purchase under the application of the Keystone Lumber Company is here for consideration in its relation to a large area of land, including that to which Pridmore's protest relates, the Department will not dismiss the appeal as to the entire quantity on the technical objection of one of the many protestants, nor will it eliminate his case and rule as to the residue. Moreover, the attorney who filed the motion for Pridmore is also attorney for others of the protestants. Notice to those others is not denied, and all being in one common class, and the question being identical as to all, it is not perceived that any injury has been done Pridmore, and the motion to dismiss is denied.

There are two others in the list of protestants who have claims to certain lands, described in your office decision and included in the application of the Keystone Lumber Company to purchase, whose claims call for attention in this connection, viz: Charles O. Paige and Louis Kolman. They were allowed to purchase under section 5 of the act of 1887 the lands claimed by them respectively, on the ground of *bona fide* purchase from the Wisconsin Central Railroad Company prior to the date of said act.

In the brief of the Keystone Company there is no waiver in terms of claim to the tracts embraced in said individual purchases, but it is

stated that there is no conflict between said purchasers and said company. This I take to be a waiver of any demand for action disturbing said purchases, and as I remember the oral argument had before me counsel for the company there disclaimed all attempt to have said purchases set aside or disturbed.

Said claims of Paige and Kolman are eliminated from the application of the Keystone Company, and the purchases as made by them respectively will stand.

This brings me to a consideration of the vital question involved in the application of the Keystone Lumber Company to purchase the residue of the lands covered by its application made under the 5th section of the act of March 3, 1887 (24 Stat., 556). Said section reads as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchasers, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption and homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

No settlement is alleged by any of the protestants prior to 1890. There is nothing, therefore, in either of the provisos to said section 5 which would prevent the purchase by the Keystone Lumber Company because of adverse settlement. It follows that the application of said company and its rights thereunder are to be considered and determined under the provisions of the body of the section.

The averment of the protestants, which is sustained by your office decision, is that the right of purchase does not exist in the Keystone Company, because it is not a purchaser by mesne conveyances from the Wisconsin Central Railroad Company of the lands embraced in its application, and the purchase of the standing pine timber on the lands did not bring it within the remedial provisions of the section.

Without setting out in full the several specifications of error contained in the appeal, it may be stated in a word that the contention of appellant is that your office erred in not holding and deciding that the purchase of the standing timber was the purchase of such an interest in the land as authorized the purchase thereof from the United States

under the 5th section of the act of 1887. In addition to this general contention, specification—seven charges

error in failing to state that the Keystone Lumber Company has acquired by due conveyance the *entire* interest of the said Wisconsin Central Railway Company in said lands; in failing to give any consideration thereto, and in failing to recognize and hold that the original purchase of said lands as evidenced by such deed of confirmation vested the entire interest in the fee of said land in the Keystone Lumber Company, and established its right to purchase said lands from the United States under the fifth section of the act of March 3, 1887.

Referring first to the specification just quoted, I am unable to see that it adds anything to the right of purchase from the United States. The conveyance mentioned was made by quitclaim deed in 1892. It does not purport to supply any omission in the original conveyance of the timber right, nor to be in any sense confirmatory. It is a new deed of a new interest—to wit: the fee—for no other consideration save the nominal sum of one dollar. It was made more than five years after the passage of the act of 1887, and at a time when the lands had been declared not to belong to the Wisconsin Central Railroad Company under its grant (11 L. D., 615). It therefore conveyed nothing. Moreover, at the time it was made, the lands were, as averred by the protestants and shown by the record, settled upon and claimed under the settlement laws.

This leaves for consideration the main issue in the case—viz: the right of the Keystone Lumber Company to purchase from the United States the lands applied for, barring those already purchased by Paige and Kolman. The issue thus presented suggests three questions, in order as follows:

1. Was the instrument executed by the Wisconsin Central Railroad Company one which constituted a sale and conveyance of the standing pine timber, or was it a mere license to go upon the lands and cut and remove the timber?

2. If a sale, was it a sale of an interest in the land—of realty, or only a sale of personal property?

3. If a sale of an interest in the freehold, does that fact warrant the government in allowing the purchase of the entire title under section 5 of the act of March 3, 1887, by those holding said interest?

In passing upon the issue suggested by the first question, your office decision of March 22, 1893, held that “a sale of standing timber is undoubtedly a sale of an interest in land,” and in effect conceded that the pine timber on these lands was sold by the railroad company, but further held that the sale of a mere interest does not entitle the purchaser of that interest to buy under the provisions of the act of 1887.

In considering the case on review, your office in its decision of October 3, 1893, in effect, ruled that the transaction between the railroad company and the Superior Lumber Company was a mere license and was not a sale and conveyance.

I have carefully examined the authorities bearing on this proposition, and I am satisfied that the weight of authority and of reason is decidedly in favor of the view that the legal effect of the instrument termed "Timber license, No. 356," was a grant and sale of the timber therein described, and I so hold. (*Strasson v. Montgomery*, 32 Wis., 52; *Williams v. Flood*, 63 Mich., 487; *Owens v. Lewis*, 46 Ind., 488, 15 Am. Rep., 295; *Caldwell v. Fulton*, 31 Pa. 475.) It is true that *Fletcher v. Livingston* (26 N. E., 1001), and other Massachusetts cases tend to support the contention of protestants, that the contract was a mere license and not a sale of the standing timber, but I do not find this doctrine to have been generally adopted in other States.

The second question naturally follows: Was it a sale of an interest in the realty, or only of chattels?

Like the question first decided, this is not without its difficulties in the light of the authorities, both English and American, which do not appear to be entirely harmonious. But the holding in most of the cases examined rests upon the common law doctrine, that standing timber is a part of the realty, and that the purchase of the same is the purchase of an interest in realty. One of the most elaborate and exhaustive opinions which I have examined on this subject is the case of *Owens v. Lewis*, *supra*, decided by the supreme court of Indiana in 1874. Said opinion cites numerous decisions of English and American courts running through a long series of years, and carefully analyzes each and draws distinctions which would scarcely be noted without careful study, thus harmonizing decisions which on casual reading might appear to be more or less in conflict, some of them being decisions cited by counsel for protestants. The argument and in effect the holding of the court in the case cited was that standing timber is a part of the realty, and therefore that a parol contract for the sale of the same to be severed and removed by the vendee is a mere license, and not such a contract as can be enforced under the statute of frauds. The array of authorities cited and discussed, in my judgment, fully warranted the holding of the court. In that case the timber contracted for was to be cut and removed within two months after agreement.

The Pennsylvania cases cited by counsel for appellant relate to the sale of coal and iron separate and apart from the lands which they underlie, and their holding is that these minerals in place may pass by deed; that they are a corporeal hereditament—a part of the realty.

In *Caldwell v. Fulton* (31 Pa., 475), the grant was of "the full right, title and privilege" of digging and taking away coal, and the court held (p. 484) that the conveyance of the right to take was the grant of the thing itself.

In the case at bar, the grant was of the right to cut and remove the timber. The principle is the same whether the sale be of the mineral under the surface, or the timber standing on the surface. The reasoning of the Pennsylvania case is therefore applicable to this case.

To the same effect are the decisions of the supreme court of Michigan. See *Russell v. Meyers*, 32 Mich., 522; *Williams v. Flood*, 63 Mich., 437. In these cases there was a written instrument or contract disposing of standing timber for consideration, the timber to be cut and removed within a specified time (in the first case within three years, in the second within two years), and the court held the transaction to be a sale of an interest in real estate.

This question has been before the supreme court of Wisconsin (the State in which these lands lie) a number of times, and the uniform holding, so far as I can discover, has been that the conveyance by written instrument of standing timber is the conveyance of an interest in the land on which it stands. *Strasson v. Montgomery*, 32 Wis., 52; *Warner v. Trow*, 36 Wis., 195; *Young v. Lego*, id., 394; *Daniels v. Bailey*, 43 Wis., 566; *Golden v. Glock*, 57 Wis., 118; *Lillie v. Dunbar*, 62 Wis., 198.

The earliest of these decisions was rendered in 1874, the latest in 1885, and all prior to the purchase from the Wisconsin Central Railroad Company of the timber on the lands to which the case under consideration relates. It would appear, therefore, that so far as the State of Wisconsin is concerned, the doctrine announced in the above cited authorities is well settled, and the rule of property resting thereon well established.

While it is true that the United States government in the adjudication of questions coming before it for action is not bound by the decisions of the state courts, they are at the same time recognized as highly persuasive and as being entitled to great consideration.

It is urged by counsel for protestants that this rule should not apply in this case with reference to the decisions of lumber states like Wisconsin, but I think the converse is the correct principle.

Wisconsin is a state in which are extensive timber and lumber interests, and because of this very fact its courts are more often confronted with questions relating to them, and are called upon to give to them the closest study and the most careful consideration. For this reason, decisions by the supreme court of that state, on questions similar to that here involved, are, it seems to me, entitled to special consideration, just as, for the same reason, the decisions in manufacturing states would be entitled to great weight on questions relating to manufacture, those in mineral states to questions relating to mines or minerals, those in seaboard states on questions of maritime law, &c.

After careful examination of all the authorities on the subject, I am led to conclude, on what seems to me the decided weight of authority, that the sale by the Wisconsin Central Railroad Company of the standing pine timber was a sale of an interest in the land, and I so hold.

This leaves to be determined the remaining question: Does the purchase of an interest in land supposed at the date of purchase to be

railroad land entitle the purchaser to acquire the entire title by paying the government price therefor as provided by section five of the act of March 3, 1887? That section has already been quoted herein. Its provision, in substance, is that where a railroad company has sold as a part of its grant, lands not conveyed and coterminous with constructed road, which are found to be excepted from the grant, the *bona fide* purchaser thereof may acquire title from the United States by paying the government price therefor. This the appellant seeks and claims the right to do, because of the *bona fide* purchase of an interest in the land—to wit: the standing pine timber.

It is to be borne in mind that the section of the statute under consideration is remedial.

Attorney General Garland, in an opinion rendered November 17, 1887, on request of this Department, relative to the act of 1887 (6 L. D., 272; 19 Att'y Gen'l's Op. 68), said, among other things:

The whole scope of the law, from the second to the sixth section, inclusive, is remedial. Its intent is to relieve from loss settlers and *bona fide* purchasers, who, through the erroneous or wrongful disposition of the lands in the grants, by the officers of the government, or by the railroads, have lost their rights or acquired equities; which in justice should be recognized.

Endlich on the Interpretation of Statutes lays down the following in section 103:

It is said to be the duty of the judge to make such construction of a statute as shall suppress the mischief and advance the remedy; and the widest operation is therefore to be given to the enactment, so long as it does not go beyond its real object and scope. When, for instance, the language in its usual meaning falls short of the whole object of the legislature, a more extended meaning may be attributed to it, if fairly susceptible of it. The scope of the act being ascertained, the words are to be construed as including every case clearly within that object, if they can do so by any reasonable construction, although they point primarily to another or a more limited class of cases.

Sutherland on Statutory Construction, section 410, says:

A remedial statute must be construed largely and beneficially so as to suppress the mischief and advance the remedy. . . . And generally it may be affirmed that if a statute may be liberally construed, everything is to be done in advancement of the remedy or the purpose intended that can be done consistently with any construction that can be put upon it. The substance of the act is principally regarded and the letter is not too closely adhered to.

And again in section 417:

When the scope and intention of an act are ascertained by all the aids available, words whose ordinary acceptation is limited may be expanded to harmonize with the purpose of the act. This interpretation is admissible of statutes generally, but has a more liberal application to remedial and some other statutes which are liberally construed.

A remedial act shall be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. As a general rule, a remedial statute ought to be construed liberally.

Other authorities in the same line might be referred to, but the rule announced in the foregoing is so familiar and so generally accepted that further citation is unnecessary.

The scope and intent of the remedial statute under consideration is aptly stated in the quotation already made from the opinion of the Attorney General.

Many persons had innocently and in good faith bought from railroad companies lands geographically within the limits of grants made to said companies, and which at the time of purchase were thought to have enured to the grants. Mistakes of this character, honestly made, were not infrequent, and in the light of the interpretation of the grants then prevailing, or in the absence of judicial interpretation, they were not surprising and were excusable. Much money and labor had thus in good faith been expended upon lands for which the railroad companies could give no title. A wrong had been done which called for a remedy. Congress only could furnish the remedy, and this it did, as to the class of cases above described, by the enactment of section 5 of the act of March 3, 1887. That section, in recognition of the equities growing out of the situation, provided for the procurement of title by purchase from the government, where it could be allowed without interfering with superior equities.

The good faith of the appellant in this case in the purchase of the standing pine timber is not questioned; the mischief done by the outlay of money on the faith of title in the railroad company is apparent, and the equities are manifest. It follows that the remedy, if there be one, should be applied. Section 5 of the act of 1887 is invoked. Your office failed to find in said section authority for allowing purchase from the government where the entire fee had not been sold by the railroad company, and denied the application.

The purchase was of the standing timber, but it appears that this constituted the real value of the freehold. It comprised not only an interest, but the paramount interest in the freehold. While it did not include the fee, it did include that which made the fee desirable. It was the interest which would really be considered when the fee was purchased. It was the substantial valuable portion of the fee, the portion worth protecting by a remedial statute.

Applying the rules of liberal interpretation to the remedial statute (*supra*), I am, after full consideration, led to conclude that the purchase of such an interest in lands supposed to be railroad lands is within the purview of its beneficent provisions, and is entitled to protection by being permitted to purchase the entire fee from the government. This is in accord with the spirit of the act and does no great violence to its letter. In this view and application of the law no one is injured, the mischief is met, the equities provided for are furnished, and the government gets full consideration for the land. Applying this construction to the case under consideration, it follows, that the

application of the Keystone Lumber Company should be allowed, except as to the tracts covered by the purchase of Paige and Kolman, referred to herein, and it is so ordered.

Your office decision is reversed.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

DESERT LAND ENTRY—SUSPENSION OF SURVEY.

LUCY J. GILBERT.

The suspension of land from entry on account of irregularity in the survey does not necessarily carry with it the invalidity of a desert-land entry made during such suspension.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1894. (J. L. McC.)

Lucy J. Gilbert has appealed from the decision of your office, dated July 30, 1892, holding for cancellation her desert-land entry made November 6, 1889, for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 15, T. 18 S., R. 26 E., Las Cruces land district, New Mexico.

The ground of your decision was that prior to the date of said entry your office had (by letter of July 7, 1886), suspended said township (among others) from entry, because of "supposed erroneous marking of the public land surveys."

The appeal is based upon the allegation that such suspension was "uncalled-for and entirely erroneous;" that the local officers allowed the entry and took her money; and that the continuance of such suspension does a great injustice to herself and others, "virtually depriving the settlers of the benefit of the liberal land laws."

Informal inquiry at your office, however, discloses the fact that the order of suspension of said township was, on July 12, 1893, revoked, and the land restored to the public domain. There does not appear to be any adverse claim to the tract, and the question is one solely between the government and the entryman.

In the case of William H. Day, whose timber-culture entry in the same section was held for cancellation by your office decision of August 8, 1892, the Department, on October 25, 1892, held that, as the order of suspension had been revoked, and the land restored to the public domain, the entry might be allowed to stand, subject to compliance with law. (L. and R. copybook No. 275, page 437.) It appears to me that a similar ruling would be proper in the case at bar—indeed, the more so since a desert-land entry may be made before survey (see circular of April 20, 1891—12 L. D., 376), hence the

suspension of land from entry on account of irregularity in the survey does not necessarily carry with it the invalidity of a desert-land entry made during such suspension.

The judgment of your office is modified as above indicated.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

HOMESTEAD—FINAL PROOF—COMPULSORY ABSENCE.

BAGLEY *v.* HENDERSON.

The time fixed by the statute for the submission of final homestead proof will not run as against the entryman during a term of enforced absence from the land under a wrongful decree of ejectment.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1894. (R. B.)

This record presents the appeal of Morris Bagley from your office decision of May 14, 1892, in the case of said Bagley *v.* Squire Henderson, involving Lot 5, Sec. 13, T. 2 N., R. 2 W., Gainesville, Florida.

Henderson made homestead entry for said land October 16, 1875, from which time until March 14, 1877, he lived upon and improved the same. On the date last mentioned, he was removed therefrom by the sheriff of the court, under a judgment rendered in a suit by Thomas A. Carr, executor of William A. Carr. The records of your office show that said William A. Carr made cash entry for land in an adjoining section. Your office states that his said executor Thomas A. Carr makes no claim to the land and finds that Henderson's eviction was wrongful.

After his said removal from the land Henderson lived on an adjoining tract.

On September 16, 1890, your office issued notice (usual in such cases) to him (Henderson) to show cause why his entry should not be canceled for failure to make proof within the statutory period.

On October 13, 1890, Henderson filed a petition to submit final proof in support of his entry. This petition was allowed by your office June 3, 1891. Henderson then made said proof against which Bagley previously filed his affidavit of protest, alleging residence upon and improvement of the land since September 13, 1890, and asking that "a further hearing in this case be granted him." Along with his said protest Bagley presented his homestead application for the land. The local officers transmitted (with accompanying papers) Henderson's proof, protest and application by Bagley to enter; thereupon your office, by decision dated May 14, 1890, denied Bagley's application to enter and also his application for hearing, dismissed his protest and

directed that final certificate be issued to Henderson, which in the event of said decision becoming final, would be submitted to the board of equitable adjudication under rule 33, general circular, approved February 6, 1892, page 212.

The statute requiring a homestead entryman to make final proof within seven years from the date of his entry was suspended as to Henderson during that period covered by his enforced absence from the land.

This being true, he was not too late to make final proof when he offered to do so, upon being summoned by the local officers to show cause why his entry should not be canceled.

For this reason your decision is affirmed.

Approved,

JOHN I. HALL,

Assistant Attorney-General.

SHEPHERD *v.* BIRD ET AL.

Motion for review of departmental decision of July 7, 1893, 17 L. D., 82, denied by Secretary Smith, February 21, 1894.

HOMESTEAD ENTRY—SETTLEMENT RIGHT.

GAYLER *v.* RANDLE.

Residence on public land, with no intention of acquiring title thereto under the settlement laws, confers no right as against the subsequent entry of such land by another.

Secretary Smith to the Commissioner of the General Land Office, February 21, 1894. (W. F. M.)

John M. Randle made homestead entry, on April 17, 1891, of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Section 9, T. 9, R. 11 E., of the Huntsville, Alabama, land district.

On June 20, 1891, Thomas A. Gayler filed an affidavit of contest alleging that he has a prior and better right of entry to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the same tract; that he first settled upon it in 1882, and has continuously resided on and cultivated it since that date, and that Randle does not reside on the land and has no improvements on the same.

After hearing upon the issue thus joined, the register and receiver rendered dissenting opinions, and the case is before me on appeal from your office decision affirming the recommendation of the register that the contest be dismissed.

The testimony shows that Gayler made a settlement on a forty adjoining the land in controversy, in 1882, but it appears, also, that at the time this settlement was made, and for many years thereafter, the contestant's dwelling was supposed to be on the land of his father lying immediately to the north. It is shown that contestant cultivates the lands of his father, and for years has managed the latter's farming operations. During all the years of his residence thereon, he has cultivated none of the public lands, nor exercised, nor claimed any proprietary rights thereto. He admits, under oath, that in building the house in which he lives, the controlling consideration was convenient proximity to the tillable lands of his father. The evidence satisfies my mind that, when Gayler established himself on the public land near by the line of his father's property, he did not have in view the acquisition of any part of the public domain for private uses. This purpose was formed later, but after other rights had accrued. The land in question was segregated by Bogan's entry on March 28, 1891, whose subsequent relinquishment appears to have been contemporaneous with the contestee's entry. The latter has six months within which to establish himself on the land covered by his entry, and I do not find that there is any bona fide claim adverse to his right.

The decision of your office is affirmed.

INDIAN LANDS—OCCUPATION BY RELIGIOUS SOCIETIES.

INSTRUCTIONS.

A religious society that occupied land at the date of the passage of the act of March 2, 1889, can have the land, to the extent of one hundred and sixty acres, granted to it, so long as the same shall be used for educational and missionary work; or, in lieu thereof such society may purchase one hundred and sixty acres, at the price prescribed in the statute, and acquire the fee simple title thereto. But such society can not have one hundred and sixty acres granted to it under the first provision of section 18, of said act, and in addition thereto purchase a similar amount under the second provision of said section.

A religious society not in the occupancy of land within either of the two reservations named in section 18, of said act, can not be granted the temporary use and benefit of these lands under the provisions of said act; but, under the general authority of the Secretary of the Interior in respect to Indian reservations, permission might be given such society, with consent of the Indians, to occupy said lands so long as the Indians and the Secretary of the Interior may deem proper.

Secretary Smith to the Commissioner of Indian Affairs, February 14, 1894.

I acknowledge the receipt of your communication of 2nd September last, in which you refer to the provision contained in the 18th section of the Sioux act of March 2, 1889 (25 Stats., 888), relating to the occu-

pation of lands by religious societies for missionary and educational work and request to be advised as follows:

(1). Whether under said section, any religious society or organization that was in occupancy of land within any of the Sioux reservations at the time of the passage of the act can be granted the use and occupancy of additional land without being required to purchase the same.

(2). Whether any such society or organization, *not* in occupancy of land within any of said reservations at the date of the passage of said act, can be granted the *temporary use and occupancy* of land for religious and educational purposes, as is done in the case of other Indian reservations.

(3). Whether, in order to acquire the use of land within any of said reservations, any such society or organization that was *not* in occupancy of land within any of said reservations at the date of the passage of said act will be required to purchase the same.

In response thereto, I transmit herewith an opinion, dated January 29, 1894, of the Hon. Assistant Attorney General for this Department, in which I concur.

OPINION.

Assistant Attorney-General Hall to the Secretary of the Interior January 29, 1894.

The Commissioner of Indian Affairs, on September 2, 1893, addressed you a letter in which he called attention to the provision of section 18 of the act of March 2, 1889 (25 Stat., 888-895), in relation to the occupation, use and purchase, by religious societies, of land in the Sioux Indian reservation, and requested to be advised on the following points:

1. Whether under said section, any religious society or organization, that was in the occupancy of land within any of the Sioux reservations at the time of the passage of the act, can be granted the use and occupancy of additional land without being required to purchase the same.

2. Whether any such society or organization, *not* in occupancy of land within any of said reservations at the date of the passage of said act, can be granted the *temporary use and occupancy* of land for religious and educational purposes, as is done in the case of other Indian reservations.

3. Whether, in order to acquire the use of land within any of said reservations, any such society or organization that was not in occupancy of land within any of said reservations at the date of the passage of said act, will be required to purchase the same.

I have been asked for my opinion as to the proper answer to be made to said questions.

The 18th section of the act of March 2, 1889, referred to in the Commissioner's letter, is as follows:

That if any land in said Great Sioux reservation is now occupied and used by any religious society, for the purpose of missionary or educational work among said Indians; whether situate outside of or within the lines of any reservation constituted by this act, or if any such land is so occupied upon the Santee Sioux Reservation, in Nebraska, the exclusive occupation and use of said land, not exceeding one hundred and sixty acres in any one tract, is hereby, with the approval of the Secre-

tary of the Interior, granted to any such society "so long as the same shall be occupied and used by such society for educational and missionary work among said Indians" and the Secretary of the Interior is hereby authorized and directed to give such religious society patent of such tract of land to the legal effect aforesaid; and for the purpose of such educational or missionary work any such society may purchase upon any of the reservations herein created, any land not exceeding in any one tract one hundred and sixty acres, not interfering with the title in severalty of any Indian, and with the approval of and upon such terms, not exceeding one dollar and twenty-five cents an acre, as shall be prescribed by the Secretary of the Interior.

In my opinion the proper construction of this section of the act of March 2, 1889, is that any religious society for the purpose of missionary and educational work among the Indians on the Great Sioux Reservation, or on the Santee Sioux Reservation, which occupied any of said lands at the date of the passage of the act, would be entitled to have one hundred and sixty acres in any one tract granted to said society, so long as such land should be occupied and used by the same for educational and missionary work among said Indians. This is the right given to such societies by the act; and it does not depend upon the consent of the Indians, nor of the Secretary of the Interior.

The same section also provides that any such society may purchase, upon any of the reservations, therein created any land not exceeding in any one tract one hundred and sixty acres, not interfering with the title in severalty of any Indian, and with the approval of and upon such terms, not exceeding one dollar and a quarter per acre, as shall be prescribed by the Secretary of the Interior.

Construing these provisions of the section, I think it is very clear that Congress meant, in the first instance, that any religious society, in actual occupancy of land at the date of the passage of the act aforesaid, should have the right to have the grant (patent?) issued to such society for one hundred and sixty acres of said land, so long as said society should occupy and use the same for educational or missionary work; or, in lieu thereof, such society (to wit, such society as used and occupied the land at the date of the passage of the act), might be permitted to purchase one hundred and sixty acres of land, and receive therefor a title in fee simple, if such society should conform to the terms and regulations prescribed by the Secretary of the Interior.

I do not believe it was the intention of Congress to give the society one hundred and sixty acres of the public lands so long as the same might be used for educational and missionary work, and also to give such society the right to buy one hundred and sixty acres of land, and get the fee simple thereto from the government; but in my opinion the intention was to give to such society the right to elect between what might be called a temporary title and right to occupy the land, and a fee simple title by purchasing the land at the government price.

In my opinion, the words "such society" in the fourteenth line of this section refer to societies in the occupancy of land on one or the other of the said reservations at the date of the act of 1889—*supra*. This

view is strengthened, in my opinion by reference to the use of the same words "such society" in the ninth line of the same section. It will be seen that the words "such society" are used in the portion of the ninth line which requires that the land shall be granted to any such society "so long as the same shall be occupied," etc.,—which must have reference to a society which occupied the land at the date of the passage of the act; and if the words "such society" in the ninth line refer to a society which occupied the land at the date of the passage of the act, it seems to me conclusive that the words "such society" in the fourteenth line refer also to a society which was in occupancy of land on the Great Sioux or Santee reservation at that date.

The act of 1889 does not give to any religious society the right to have lands granted to it so long as it uses said land for educational and missionary work, or the right to purchase as provided in said act, unless such society occupied lands on one of the two reservations at the date of the passage of the act. I therefore advise that the following answer be made to the questions propounded by the Commissioner of Indian Affairs.

(1) A religious society that occupied land at the date of the passage of the act of March 2, 1889, could have the land, to the extent of one hundred and sixty acres, granted to it, so long as the same shall be used for educational and missionary work; or, in lieu thereof, such society can purchase one hundred and sixty acres of land, at the price prescribed in the statute, and get the fee simple title thereto. But such society could not have one hundred and sixty acres granted to it under the first provision of section 18, and then in addition thereto, purchase one hundred and sixty acres as provided in the second provision of the same section.

(2) A society not in the occupancy of land within either of the two reservations mentioned in the 18th section of the act of 1889 could not be granted the temporary use and benefit of these lands under the provisions of said act; as said act confers no rights upon any society unless it was in occupancy of the lands in one or the other of the two said reservations at the date thereof. But, under the general authority of the Secretary of the Interior in respect to the Indian reservations, permission might be given to such religious society, with the consent of the Indians, to occupy said lands so long as the Indians and the Secretary of the Interior may deem proper.

(3) My answer to the third question is covered by the above answer to the second.

PRACTICE—NOTICE OF DECISION—APPEAL.

AUGUSTUS H. BERRY.

An appeal should not be refused on the ground that it is taken out of time, if a copy of the adverse decision is not served on the appellant.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 17, 1894. (J. I. P.)

On July 1, 1891, Augustus H. Berry made homestead entry No. 2386 for the SW. $\frac{1}{4}$ of Sec. 7, T. 48 N., R. 8 W., in the Ashland, Wisconsin, land district, and on August 27, 1891, commuted the same to cash entry No. 5405.

On December 19, 1892, your office, by letter "G" of that date, held that said entry having been made subsequent to the act of March 3, 1891 (26 Stat., 1095), it came within the provisions of Sec. 6 of that act, and you directed the local office to require Berry, whose address was given in his final proof as Iron River, to furnish supplemental proof without republication, showing residence and cultivation for a period of fourteen months subsequent to July 1, 1891, the date of his homestead entry.

On April 10, 1893, the local office transmitted to your office evidence of service of notice of said decision of December 19, 1892, and reported that no action was taken by parties in interest. Said evidence of service alleges that notice of said office decision of December 19 was duly mailed January 7, 1893, to claimant by registered letter addressed to the post-office named in his proof, and said registered letter was returned unopened.

On June 24, 1893, Britton and Gray, attorneys, filed an appeal from the decision of December 19, *supra*, to this Department, and on July 14, 1893, by letter of that date, addressed to the local office at Ashland, your office held that more than five months having elapsed since said decision of December 19, said appeal was clearly out of time, and could not be transmitted to the Hon. Secretary, as the party had lost his right of appeal in the premises, and suspended action on the case in accordance with rule 85 of the rules of practice, and advised Britton and Gray of the action taken, and directed the local office to promptly notify the parties in interest of said action.

This Department is now in receipt of an application by Berry, through John H. Hickox, his attorney, for an order directing you to certify said proceedings to this Department, as provided in rules 83 and 84 of rules of practice.

This application, sworn to by Hickox, as attorney for Berry, is based upon the following grounds—

1st. Because it was error to hold in the Commissioner's decision of December 19, 1892, that supplemental proof as to residence and cultivation should be required.

2nd. Because it was error to reject by your letter of July 14, 1893, the appeal of Messrs. Britton and Gray from said decision because not filed on time for, a- No limitation of time was given in your letter of December 19, 1892, for complying with its requirements and b.- If such limitation of time had been stated it would have been *ultra vires*.

3rd. Because many entries precisely the same nature as the one at bar have been patented since the passage of the act of March 3, 1891, and because a number of others of precisely similar nature have been confirmed at a recent date under section 2450, Revised Statutes.

4th. Because it is shown by the record that no notice of the Commissioner's decision of December 19, 1892, was ever received by Berry or his assignee.

Without considering at this time all the points raised by counsel in his able and elaborate brief, your attention is called to the fourth ground or specification of error on which said application is based.

From the facts herein stated, it appears that only information of the adverse decision of December 19, 1892, was mailed to the address of Berry, and not a copy of said decision.

In the case of Dougherty *v.* Buck (16 L. D., 187) a motion was made by Buck to dismiss Dougherty's appeal from the decision of your office, because not taken in time. It was shown, however, that the notice to Dougherty of your decision did not contain a copy of the same; that by your direction a copy of said decision, which was adverse to him, was served on Dougherty, and that his appeal having been taken within the required time from the receipt of the copy of said decision, it was in time, and the motion to dismiss was overruled.

As there has never been a copy of your decision of December 19, *supra*, which was adverse to Berry, served on him, or his assignees, and he has, in contemplation of law, received neither actual nor constructive notice of said decision, it would appear that under the principle established in the case of Dougherty *v.* Buck, above quoted, the motion must be sustained. A consideration of the case on its merits, as presented by counsel in his brief, is at this time not deemed necessary.

For the reasons herein stated, you will certify the record in said case to this Department for its consideration.

SURVEY—CONTRACT—ANNUAL APPROPRIATION.

INSTRUCTIONS.

The balance of any apportionment of an annual appropriation, made specifically for the services of a fiscal year for the survey of the public lands, can be used in paying the expenses of a survey completed during the fiscal year subsequent to that for which the appropriation was made, provided such payment be for the discharge of liabilities incurred in the fulfillment of a contract properly made during the fiscal year for which such appropriation was made, even if the work under the contract be completed after the expiration of the period specified therein.

Secretary Smith to the Commissioner of the General Land Office, February
(J. I. H.) 19, 1894. (W. M. B.)

Your letter "E" of October 19, 1893, calling the attention of this Department to the rule adopted by the Treasury Department, "in reference to paying the liability of executed contracts" for the survey of the public lands "from the appropriation for the fiscal year in which the work was performed," when said contract had been completed subsequent to the fiscal year during which the contract was awarded and for which the appropriation was made, is before me.

Referring to the construction placed by the Treasury Department upon departmental decision of March 22, 1886, in the case of *ex parte* G. W. Baker *et al.* (4 L. D., 451), you state, *inter alia*, in your said letter, that—

While, under said decision and existing official instructions governing extensions of time under approved contracts, the action of the Treasury Department was proper, the amounts found to be due contracting deputy surveyors for work executed *after* the expiration of the periods stipulated in contracts or formal extensions, should properly be paid from a deficiency appropriation.

The funds available for the purpose of surveying the public lands are the apportionments made to the several States from the general appropriation made specifically for each current fiscal year by act of Congress, providing for sundry civil expenses of the government for the fiscal year therein named, and section 3690 of the Revised Statutes, regulating the expenditure of such appropriations, provides that—

All balances of appropriations contained in the general appropriation bills and made specifically for the service of any fiscal year, and remaining unexpended at the expiration of that fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year; and balances not needed for such purposes shall be carried to the surplus fund. This section, however, shall not apply to appropriations known as permanent or indefinite appropriations.

Discussing the question of the expenditures of annual appropriations contained in the various acts of Congress, in the James' case (1 Lawrence, 381), it is held that—

Under the appropriations in such acts making compensation for the performance of work under contracts, the money appropriated can generally be paid for work done during the year, or "to the fulfillment of contracts properly made during" the year, and to be completed within two years thereafter.

Passing upon the same question (13 Op., p. 289), Attorney General Akerman expressed the following view—

I am of the opinion that balances of appropriations made for the fiscal year 1869-70 of any description, even if contained in annual appropriation bills, and made specifically for that fiscal year, may be applied to the service of the year 1870-71, so far as, *first*, to pay in the current year expenses properly incurred in the former year; and *second*, to pay dues upon contracts properly made within the former year, even if the contracts be not performed until within the latter or current year. This is plainly allowed (by express exception to prohibitions) in the very terms of section 5.

Section 5, above referred to, is contained in the act of Congress, approved July 12, 1870 (16 Stat., 251), and is embodied in section 3690 of the Revised Statutes, *supra*.

The above opinion was, on March 12, 1887, fully concurred in by Attorney-General Garland (18 Op., 569).

By the act of June 20, 1874 (18 Stat., Sec. 5, p. 110), Congress adopted a more comprehensive and stringent rule respecting appropriations, whereby the Secretary of the Treasury was directed to "cause all unexpended balances of appropriations which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury," with provision containing specified exceptions, in which said exceptions balances remaining from apportionments of annual appropriations for current expenses of the public surveys are not included.

The decision in the Baker case, referred to, *supra*, had reference to appropriations from which expenses of survey of certain public lands were to be paid, under the *deposit system* and does not affect the general rule laid down as relating to the manner and time in and during which annual appropriations for the public surveys may be used.

It is clear from the foregoing that the balance of any apportionment of an annual appropriation made specifically for the services of a fiscal year for the survey of the public lands, can be used in paying the expenses of a survey completed during the fiscal year subsequent to that for which the appropriation was made, *provided*, such payment be for the discharge of liabilities incurred in the fulfillment of a contract properly made during the fiscal year for which the appropriation was made,—even if the work under the contract be completed *after the expiration* of the period specified therein, whether the time, for the completion of such contract had been formally extended or not previous to the expiration of the period so specified.

No more feasible practice could be adopted to carry out the true meaning and intent of the provisions of the several acts of Congress above quoted and referred to. The rule upon which such a practice is based has been supported and sustained by those tribunals intrusted with the interpretation of the law. Its adoption and enforcement will produce no confusion in the accounts of the Treasury, or the books or records of the General Land Office. When a contract is made with the intention of liability thereunder being paid out of appropriation for the year

during which, or for which, it was made, no possible confusion can arise by payment being made out of said appropriation, though it be made during the subsequent fiscal year, but a contract containing a stipulation that payment be made from the appropriation for the fiscal year for which it was made, should in no case be paid out of the appropriation made for the following current fiscal year. It can readily be seen how such a practice would interfere with the apportionments of appropriations for the current fiscal year, and produce endless confusion in the accounts of the Treasury.

In all cases where contracts are awarded for public surveys—liabilities payable from annual appropriations made specifically for a current fiscal year—and such contracts are not completed during the life of such annual appropriation or within the two years' limit, as prescribed in section 5 of the act of June 20, 1874, *supra*, the balance of such appropriation, if any, for stated service, will be carried into the Treasury, and all liabilities arising under contracts so completed must be paid from specific amounts appropriated in the yearly or other deficiency bills for such purpose.

TIMBER CULTURE ENTRY—ALIENATION.

PALMER *v.* STILLMAN.

A contract of sale in which a timber culture entryman is bound to execute a warranty deed to another, on securing title to the land covered by his entry, in consideration of the payment of certain notes and compliance with the timber culture law on the part of the purchaser, defeats the right of the entryman to perfect his claim.

The revocation of such a contract, after the initiation of a contest against the entry charging the fact of alienation, will not relieve the entryman from the consequences of his illegal act.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 17, 1894. (J. L. McC.)

I have considered the case of George D. Palmer *v.* Eugene N. Stillman, on the appeal of the former from your office decision of April 20, 1892, dismissing his contest against the timber-culture entry of the former, made November 3, 1880, for the SE. $\frac{1}{4}$ of Sec. 4, T. 141, R. 58, Fargo land district, North Dakota.

Contest affidavit was filed January 22, 1891, on the charges, in substance, (1) that the entryman had failed to plant and cultivate the land as required by law, and (2) that he had alienated and abandoned the land by selling the same to one Harrison Wilson.

With reference to the charge of alienation, your office found (in this respect sustaining the finding of the local officers):

That the transaction between Stillman and Wilson was . . . a mere voidable agreement . . . and being more in the nature of an offer to sell, comes clearly within the rulings of the Department in the cases of *Meyhok v. Ladehoff*, and *Vandivert v. Johns* (9 L. D., 327 and 609); the voidable nature of the transaction being still further demonstrated by the written revocation of the agreement by Stillman, dated March 23, 1891.

The document in question, dated December 18, 1886, is an ordinary bond for a deed. It provides that Wilson shall pay Stillman twelve hundred dollars in stated installments, deferred payments (for which notes are given) bearing interest at seven per cent. per annum; also that he shall pay all taxes, and keep ten acres of trees in good growing condition, so as to fully comply with the law. Stillman binds himself, his heirs, executors and administrators, to give a good and sufficient deed, in fee simple, of the premises, when the said twelve hundred dollars, with interest, shall be fully paid. The instrument further provides that if Wilson—

Shall fail to make any of the payments of purchase-money or interest above specified at the time and in the manner above specified, in such case this agreement shall be henceforth utterly void, and all payments thereon forfeited, subject only to be reviewed and renewed by the act of the party of the first part or the mutual consent of both parties.

It will be seen that the agreement was not revocable at Stillman's option, because Wilson, having given the consideration, could enforce the contract upon paying the notes as they became due. Nor was it voidable at Wilson's option, for he had given his notes, which were negotiable and could be enforced against him in the courts. In short, it was an instrument of the most binding character, from which neither party could escape at will; it was in effect an absolute sale of the land, coupled with a mortgage given by the purchaser to the grantor in order to secure the deferred payments.

The understanding between the parties was that it was an absolute sale. Stillman testifies:

I sold my timber-culture entry by contract to one Harrison Wilson, on the expressed condition that he was to cultivate and keep the trees in good growing condition; and at the end of six years, or when I proved up and got my patent, I was to give him a deed according to the contract. . . . At the time of selling the place to Harrison Wilson I had one hundred and two acres broken on the place.

Wilson testifies that he bought the land from Stillman. In his letter of June 16, 1888, to Stillman, introduced into the record by himself, he writes:

Mr. Stillman, you need not have any fear of my taking the crop off and let the place go back; I don't like to work well enough to get one hundred and five acres into crop and be to the expense for one crop; I bought it for a home and intend to make a home of it.

Several other letters of similar tenor are embodied in the record, showing that both parties to the contract regarded it as an absolute sale.

Your decision holds, that the voidable nature of the transaction is "still further demonstrated by the written revocation of the agreement, by Stillman, dated March 23, 1891." This revocation was more than two months after the initiation of contest, and could not avail, at that late date, to cure his illegal act. In the case of *Crawford v. Ferguson* (10 L. D. 274), the latter conveyed to one Coughran an undivided half-interest in the land covered by his entry: Crawford instituted contest

on charge of such sale and conveyance; thereupon Coughran reconveyed his interest to Ferguson. But the Department held that (see syllabus) "the defect could not be cured by a reconveyance in the presence of an intervening contest charging said incompetency;" adding, "if the contestant could be deprived of the fruits of his contest in a case like this, there could hardly arise a case in which he could be successful." It is true the case last cited was that of the alienation of a homestead entry but the principle governing the two is essentially the same—as has heretofore been repeatedly held by the Department.

The case most nearly analogous to and which must govern the decision in the case at bar, is that of *Klock v. Husted* (2 L. D., 329). There is this difference: that in the case cited the purchaser failed to plant and cultivate trees, while in the case at bar the local officers and your office find that there was no contestible failure in this respect, either by the entryman before sale, or by the purchaser afterward; and after an examination of the testimony I find no reason for disturbing said concurring conclusions with regard to this branch of the case.

In the case of *Klock v. Husted* (*supra*), the question whether the alienation of the entry was sufficient cause for cancellation was brought directly in issue, as in the case at bar, by having been explicitly charged in the affidavit of contest. As in the case at bar, the evidence showed an agreement to sell and convey executed after entry. Referring to the timber-culture acts of March 13, 1874, and June 14, 1878, the Department said:

Neither of the acts contains, in terms, the provisions of the pre-emption law that one claiming under that law shall not make any agreement or contract by which the title he may acquire shall inure to the benefit of any person except himself, but the tenor and spirit of both are to that effect; and as a timber-culture entry is not assignable, whenever it appears that the entryman has sold the land, or holds it for another, . . . he is no longer a legal or an equitable beneficiary of the government, because he violates the conditions upon which his entry was allowed, and under which only it can be maintained . . . Husted appears to have turned over to Hutchinson his entire interest in the land, excepting his right of re-entry upon Hutchinson's failure to meet his obligations under their agreement; otherwise it was an absolute sale (or agreement to sell) of all his rights under his entry, so far as he could effect a transaction of that nature. He did nothing, nor caused anything to be done, in his own behalf during the years 1878, 1879, 1880, or 1881, relative to the planting and cultivation of trees, but left that whole matter to Hutchinson, to be performed by him in his own (Hutchinson's) behalf . . . On these facts I am of the opinion that Husted abandoned the land from the fall of 1877 to the spring of 1882, with intent during that time to convey it to Hutchinson—for whose use and benefit he held his entry—upon his acquisition of title.

By the above decision, which has never been overruled or departed from, the Department has definitely settled the question that such a contract as that made in the case at bar amounts to an abandonment of a timber-culture entry by the party executing the contract, and defeats his claim.

Your decision dismissing the contest is therefore reversed; and Stillman's timber-culture entry will be canceled.

SCHOOL LAND—MINING CLAIM—VALUE OF LAND.

STATE OF WASHINGTON *v.* MCBRIDE.

Land known to be mineral in character at the date of the admission of the State to the Union is excepted from the grant of school lands to the State.

When a legal location of a mining claim has been made on land returned as agricultural, the return of the surveyor-general is overcome, and the burden of proof shifts to the party attacking the mining claim.

In determining as a present fact the existence of mineral in paying quantities the physical difficulties to be overcome in working the mine may be properly considered. But questions as to whether the claimant can obtain the necessary means to prosecute the contemplated mining operations, or secure the requisite right of way for a water supply are not for the Department to determine.

The value of land for town lots will not preclude its disposition under the mining laws if such land is in fact of the character subject to entry under said laws.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 17, 1894. (G. C. R.)

On February 25, 1890, John G. McBride filed mineral application No. 18, for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 16, T. 20 N., R. 3 E., Olympia, Washington.

This application embraced six locations, numbered from 1 to 6, each covering twenty acres, on claims by right of discovery of placer mining, made, respectively, by M. Topliff, C. P. Topliff, Reed A. McLean, F. T. Crowe, H. R. Laplain, and H. O. Geiger.

These claims were all located on September 23, 1889.

The several locators sold their respective claims to McBride, who, after making his mineral application therefor, duly made publication.

On March 7, 1890, the State of Washington, through its Attorney-General, W. C. Jones, filed a protest against the application, alleging, substantially—

1. That all of said section 16 is the property of the State.
2. That the land described in the application contained no valuable deposits of gold, or other mineral.
3. That the land adjoins the city of Tacoma, and is of the value of more than \$1,000 an acre, and that the application is not made in good faith, for the purpose of securing the land as a placer claim, but for the purpose of fraudulently acquiring title thereto on account of its great value as city property.

A hearing was ordered, fixing July 10, 1890, and both parties, with their counsel and witnesses, appeared. The hearing was not concluded until August 10, following. The testimony thus taken is exceedingly voluminous; much of it is irrelevant and impossible of reconciliation.

The register and receiver held that on the mineral applicant was placed the burden of proof to show the mineral quality of the land, and that a preponderance thereof did not show the mine to be valuable for mineral purposes, and that

even were it shown that this tract under ordinary circumstances would be fairly valuable for mining purposes, still we would not recommend the allowance of the

application, considering the great difficulties that would be encountered and the immense amount of money that would be required to be expended in the operation of the mine.

On appeal your office, by decision dated January 4, 1893, reversed that action, holding that "the testimony by the State is of a negative character, while that of claimant is affirmative and positive, and therefore the latter is entitled to the greater weight;" that a preponderance of evidence shows that the land in controversy was, at the date of the admission of the State, known to bear gold; that as a present fact it exists there in paying quantities; and that water and a convenient dump with sufficient fall can be secured to successfully work the claim by the usual method; also, that as a present fact it is of little or no value for agricultural or horticultural purposes. It was therefore held by your office that "the land did not pass to the State, but is excepted from the grant, and subject to disposal under the mining laws."

A further appeal brings the case to this Department, and the issues as disclosed by the voluminous specifications of error may be summed up as follows:

That your office erred in holding—

1. That the present or prospective value of the lands for town lots for the city of Tacoma cuts no figure in this proceeding.

2. In refusing to consider an affidavit of one Deam, with reference to the further sinking of a shaft, after the hearing was concluded; and the evidence as disclosed by that affidavit as to the non-existence of gold in paying quantities.

3. That the State's witnesses were careless in panning.

4. In holding that the claim had not been "salted."

5. That the land is possessed of little or no agricultural value.

6. That water can be practicably brought upon the claim to move the same by the hydraulic process, or that there is a practicable "dump" for the debris of the mine in the working of the same by that process.

7. That gold exists in paying quantities.

8. In not holding that the absolute title of the lands had passed to the State at the date of the location of the mines situated thereon.

The entire record in this case has been very carefully examined. In view of the voluminous character of the evidence, counsel for the State have prepared an abstract of the testimony. This abstract covers four hundred and ninety pages, and has been of much service. With a record so extensive that practice, while not required, is a commendable one.

The land in question lies in the northwest corner of said section 16; adjoins the city limits of Tacoma on the south and covers one hundred and twenty acres. It is about one and a half miles south of the tide flats of Commencement Bay, and is about three hundred feet above the line of high tide. Gallagher's gulch, in which flows a stream of water about eight feet wide, running north, cuts the land on the western side. This gulch is of a "V" shape, and extends to the north

side of the claim, and is about one hundred and thirty feet deep, at the north side of the section. This stream enters Commencement Bay about one mile distant from and north of the claim. The sides of the gulch are quite steep, rising in some places at an angle of about forty-five degrees, and the width from bank to bank at the top is about five hundred feet. The surface of the claim is generally rough and hilly.

The alleged discovery of gold, the location of the six claims and certificates thereof filed for record, all antedated the admission of the State into the Union. If on that date (November 11, 1889,) the land was known to be mineral, it was, by section 18 of the enabling act (25 Stat., 681), excepted from the grant, and the State was expressly authorized to select an equal quantity in lieu thereof, for school purposes.

This land was surveyed in December, 1866, and the plat approved February 12, 1867. The field notes of this survey, describing only the exterior lines of the section, show the land on the north half of the line, between sections 16 and 17, to be "broken third-rate; timber, fir, and cedar;" and on the line between sections 16 and 9 (north side of claim) "third rate." The exterior lines only of the section having been thus officially described, and no requirements imposed upon the surveyor to explore the interior of the section, the report thereon is of little value as to the mineral or non-mineral character of the land. (*Winscott v. Northern Pacific Railroad*, 17 L. D., 274). At most, it only shows that the land is third-class agricultural.

C. M. Anderson, a civil and mining engineer, was appointed a deputy United States mineral surveyor, about the year 1884; he was ordered by the surveyor-general of Washington to examine the land and make a report thereon. This he did, in January, 1890, and spent about two days in the work, assisted by one H. H. McDonald. He described the character of work done on each of the six locations, now embraced in the one claim.

In claim No. 1, he describes a shaft, eighteen feet deep and six feet square; an engine to hoist dirt and water; a flume, with a dam, was constructed—this flume is about one hundred and thirty feet long. From this flume the surveyor made two tests—one pan yielded about eight cents, and the other thirty-nine cents (to cubic yard); a road was graded to this claim.

On discovery claim No. 2, about three hundred feet south of the shaft on No. 1, is a shaft, four by six and eight feet deep.

Discovery No. 3: "An open cut starts near the north boundary of claim, about five hundred feet west of the northeast corner of claim, and runs south forty feet to the opening of a tunnel, four feet wide and six feet high, measured outside of timbers; this tunnel is well timbered and is driven southward over sixty feet; about thirty feet west of this tunnel is a shaft, four by six feet, twenty-two feet deep."

Discovery No. 4 is a shaft, three feet square and five feet deep.

Discovery No. 5 is "a prospect shaft, three feet square, five feet deep."

Discovery No. 6 "a shaft, three feet square, and seven feet deep."

Water from Commencement Bay or America Lake (eight miles to the southwest) can be brought on the claim in sufficient quantities for hydraulic mining. . . . These claims are well situated for placer mining. . . . I washed earth at different points of each of these claims and in each pan found gold. . . . The surface earth contained very fine particles. Upon going down, the gold became coarse; at a depth of eighteen feet in the shaft in No. 1 the gold was quite coarse. Crossing all these claims is the track of the Tacoma and Fern Hill Railway, a county road and telephone line." (He places the value of all mineral improvements) "between \$2,500 and \$3,200. . . . The cost might have been much more, but could be replaced at that price.

Such is the deputy surveyor's report, and having been made in an official capacity in pursuance of the surveyor-general's orders, under section 2334 of the Revised Statutes, it is of much greater weight in showing the true character of the land than the report of the field notes of the original survey, which, while silent as to the mineral quality of the land, represents it as "third class." In Mr. Anderson's testimony at the hearing he states that the land has no value whatever for agricultural purposes. Apart from the greater value of this report, as compared with the meager notes of the original survey, and the consideration thereof as to which of the two parties should have the burden of proof, it is held by this Department, in the late case of *Northern Pacific Railroad Company v. Marshall et al.* (17 L. D., 545), that—

When therefore a legal location has been made on land returned as agricultural, the slight return of the surveyor-general is, *ipso facto*, overcome, and the burden of proof shifts to the party attacking such mineral entry. By such discovery and location, it is demonstrated that the return was erroneous, and it would be trifling with physical facts to put the onus on the locator to present further evidence, until it is shown that as a matter of fact he had no discovery.

Here were six locations made, a return of a deputy mineral surveyor confirming those discoveries, and showing more than the necessary expenditure on the claim and the practicability of the process proposed to be employed in the mining—i. e., hydraulic—process. The burden of showing the non-mineral character of the land was clearly upon the State; and it should have been required to present its evidence of the alleged non-mineral quality of the land before claimant was required to offer his evidence in rebuttal. The opposite method was, however, employed.

The principal question in this controversy is, whether there exist upon the claim, as a present fact, deposits of gold, or other mineral, in paying quantities, by which must be meant such quantities as, in view of the physical difficulties to be overcome, would justify mining. It is shown that if such deposits do exist, it is only by the hydraulic process that the mine can be successfully worked.

Is such a process feasible in this case, and does it promise such results as would warrant its introduction?

The hydraulic process of mining is the more modern method. It is employed in California and other mining States. By this process great banks of gravel are washed down, the debris carried away in flumes, and the gold caught therein, by means of quicksilver and riffles (wooden blocks) placed in the upper part of the flumes. Gravel deposits, which would not pay wages by the earlier system of panning or rocking, are found very profitable in hydraulic mining where large banks of auriferous deposits are run through the flumes and the gold arrested. The employment of this process requires the use of an adequate supply of water, and a place for depositing the debris. Without these facilities, a placer mine of the character just described is practically valueless.

If it be admitted that gold exists on the claim in considerable quantities (a question hereinafter referred to), still, if it were shown at the hearing that it is impossible or even impracticable to obtain a sufficient volume of water for the necessary washing away of the gravel deposits, or a sufficient area of ground at a proper distance and depression on which to deposit "tailings," the mine would be valueless. Much testimony was given on these two points.

As to the water supply: It was reported as above seen, by the deputy mineral surveyor, that water can be obtained either at the Puyallup River, distant from the mine about 10,000 feet, or from America Lake (eight miles to the southwest). McBride, in his testimony, thinks it is most practical to get it from the river, and undertakes to show that it can be pumped therefrom and deposited in a reservoir on a high point adjoining his claim, thence conveyed under natural pressure through pipes to the land. It is admitted that the necessary machinery would be costly. Mr. Robert Moran, mayor of Seattle, Washington, a machinist, and familiar with the cost of machinery, etc., estimates the cost of a plant to raise a continuous flow of water, 1,000 miner's inches, 250 feet, at a distance of 12,000 feet, at \$68,000, and for 2,000 inches, he would add sixty or seventy per cent. He makes the operating expenses insignificant.

The State introduced Mr. Benezette Williams, of Chicago, Illinois, then engaged as superintendent of the construction water works in Seattle, who gave the approximate cost of putting in works and pipes, and building a reservoir sufficient to supply 2,000 miner's inches of water a day, at a height of 350 feet, from the river to the claim, at \$500,000. He also estimates the attendance and wear and tear of such a plant at \$750 a day. He estimates the cost of a pipe for 1,000 inches of water at a little more than one-half of the above amount. He does not go into the details in making up this sum, but admits that it would be reduced one-half, if the water were raised only 250 feet.

Whether such a plant would cost \$100,000 or \$200,000, I think the evidence as a whole shows that a sufficient supply of water may be obtained, and the wisdom of making the necessary expenditure to obtain that supply depends entirely upon the richness or character of the mine.

If, as testified to by numerous witnesses, the deposit of gold is general throughout the various portions of the claim, and Dr. W. E. Everett, the assayer and mineral expert, is correct in estimating the value of the claim at \$3,240,000, on the basis of eighteen cents of mineral value to the cubic yard of available material, the cost of the water, even at the highest estimate, is but a small consideration as an investment for even half that amount.

The same considerations obtain as to the question of the disposition of the debris from the mine. Many suggestions have been made as to the impracticability of running off the gravel; it is shown that the debris would have to be carried "a mile and a quarter, or a mile and a half," to reach the bay; a flume would have to be constructed, and some intervening town lots and the tracks of the Northern Pacific Railroad encountered; difficulties of obtaining the right of way for the flume have been urged, and, finally, that the fall from the mine to the tide flats or bay is insufficient to run the tailings to the proposed dumping ground.

Much testimony has been given on both sides as to what the grade of the flume would have to be to carry the refuse—some say six inches to the rod is necessary; while others (the claimants) think three inches adequate, and that more than that grade may be obtained.

Manifestly, the grade of the flume depends upon the character of the gravel.

Bowie, in his "Practical Treatise on Hydraulic Mining" (1885), page 219, a work often quoted in this case, says:

Experience thus far has led to the adoption in most localities of what is called a six or six and one-half-inch grade, meaning six or six and one-half inches to the box, twelve feet long, or say a four to four and one-half per cent grade. In some places, where large quantities of pipe clay are washed off, nine and twelve-inch grades to the box are used (six to eight per cent). In others, on account of natural obstacles encountered, a one and one-half per cent grade, or two and one-half to three inches per box of sixteen feet is used.

Again, on page 143 of the same treatise, he says:

Flumes are set, where practicable, on grades of twenty-five to thirty-five feet per mile (about $\frac{1}{2}$ per cent), and are consequently of proportionally smaller area than ditches.

(Three inches to the rod is 1.51 per cent.)

It is in evidence that the gravel on the claim is of such a character as to be easily carried away through the flumes. However that may be, all the difficulties so earnestly and ably urged can be overcome, if the gold exists in anything like the quantities alleged.

The collateral questions, as to where claimant is to obtain the means to make the necessary outlay for the water and the flumes; how he is to obtain the right of way, etc., are not for this Department to settle. If it were shown that any necessary agency for the proper working of the mine was impossible to obtain, and without which the land, though containing gold, could not be worked, a more serious question would

be encountered; but I do not think the evidence discloses such impossibilities. Claimant has disclosed the plans of mining this claim, which he supposed would be most practical; if the gold really exists, he may adopt such plans or any other which he deems most feasible, and this is a matter for him alone to settle.

If the gold exists in the quantities sworn to by claimant and his witnesses, or even to a much less extent, there is no reasonable doubt that the land is subject to disposal under the mining laws. Numerous pits were dug, and the gravel examined. One Dr. Everett examined the mine, at claimant's request, and made a written report thereon. He also testified in the case. His report and testimony demonstrate wide experience and extensive learning as an assayer. He went to the claim and took therefrom samples of the gravel from different parts, and made an assay. He found the mineral value to average 18.384 cents per cubic yard. The gold alone he found ran as high as 13.74 cents per cubic yard. It also appears that about eight hundred and seventy cubic yards of the gravel were washed by claimant's hired hands, and the results were ten and two-thirds cents to the cubic yards.

Anderson, the deputy mineral surveyor, washed gravel from all the six locations (twelve or fifteen pans), saved the product and had it assayed, and states that it resulted in an average of nine cents per cubic yard. In one of the pans the result was thirty-nine cents per cubic yard. Many witnesses swore to even greater results.

Mr. Bowie in the treaties above cited, on pp. 277, 278, and 279, gives a tabulated statement of the average yield to the cubic yard of certain mines in California, the items of expense, and the relative proportion of those expenses in working them by the hydraulic process. It places the average yield of the La Grange Co. per cubic yard at 10.19 cents, and the cost of extracting the mineral (water, labor, material, etc.) at six cents. Another claim (No. 8, North Bloomfield Co.), the gross yield is placed at 3.99 cents per cubic yard, and the cost per cubic yard to extract it 2.86 cents; for another year (1875-'76) the same mine yielded 6.60 cents per cubic yard gross, costing 3.25 cents per cubic yard, and for 1876-'77, the gross yield was 12.68 cents per cubic yard, and the cost of extraction 6.19 cents.

It can not be stated with much exactness as to what it would cost per cubic yard to extract the gold from this claim. Dr. Everett thinks it would cost six cents at first, and would be gradually lessened, as the work progressed. His opinion is very conservative when compared with the above table.

Taking claimant's showing as a whole, without reference to other testimony, the mine is undoubtedly a valuable one, and the land subject only to sale under the mineral laws. But a strong showing has been made that the land is valueless as a mine. Several practical miners were employed by the State to make an examination of gravel. Mr. White is very positive that the quantity of gold found in the gravel is

so small that it adds nothing to the value of the land. Mr. Douglas testified that he panned out seventy-five or one hundred pans of gravel and only got one "color." Other witnesses testify to careful panning and finding but few "colors"—entirely too little to pay for extracting.

An effort was made to show that claimant or some of his witnesses "salted" the mine by shooting gold into the banks with a gun. I have carefully considered all the testimony bearing upon this phase of the question, and readily concur in the opinion of the local officers and your office that such charge was not sustained.

Mr. Deam, a witness for the State, saw one man pan two shovelfuls and got over two hundred and twenty-five colors (very high). It was from this and like pannings by a few others containing large prospects, and the many places in which no gold was found, that some of the witnesses thought the mine had been tampered with. Considering the magnitude of the gulch on which the principal part of the prospecting was done, it is hardly reasonable to suppose that claimant would have gone to the extra trouble and expense to have inserted gold in the gravel with the slight chances of its discovery by the State; added to this expense would have been the great hazard of the discovery of the fraud, if a shotgun were used.

It appears that when the claimant's testimony was being taken, the State employed men and sunk a shaft, twenty-seven feet deep, near the bluff on top of the hill. Practical miners were employed, and the gravel from the shaft was washed out, and testimony of the results given, showing no gold of appreciable quantities. Mr. McBride and his hands were not permitted, however, to go into that shaft, or examine its products. When he requested this privilege, he was refused, and deputy-sheriffs were at the shaft, night and day, to guard it; it was also fenced in.

There is also considerable testimony showing that the panning and rocking from that shaft was carelessly done—the debris being washed in running water, and an apparent effort "not to find gold."

After the hearing was closed, this shaft was sunk ninety-seven feet, and evidence of the results is among the files of the case showing no appreciable quantities of gold.

It does not appear that McBride ever objected to any one prospecting the claim; on the contrary, a great number of his witnesses were invited to do so, and in some cases strangers to him chanced to be there and prospected, and so far as those persons testified, they unite in pronouncing the mine a valuable one.

The State, on the other hand, suspecting McBride of fraud, and fearing or professing to fear that his assistance in the mining might cast a doubt upon the real quality of gold in the undisturbed gravel, after the test of panning, forbade his examination of the dirt from the shaft.

It was manifestly unfair to McBride to prevent his examination of the contents of that shaft, and to accept the evidence of the State's

witnesses—all hostile to claimant's interests—as to the character of the deposits from that shaft, would be equivalent to the consideration of ex parte testimony in a contest which gives undue advantage to one side, and should not be permitted.

As to the agricultural qualities of the land, I concur in your office finding that it has little value. Doubtless by extensive fertilization, it could be made to produce fruits and vegetables, and its close proximity to the city might make its cultivation for such purposes fairly remunerative.

The land is doubtless valuable for town lots. Sundry real estate agents were introduced by the State to prove such value, and they place the same from three to six thousand dollars an acre. I concur in your office decision that its value for town lots is an immaterial question; that whatever its value for such purpose may be, it would still be disposed of under the mineral laws, if in fact mineral land. I am not unmindful, however, of the additional incentive which it values for town lots may give to claimant in his efforts to obtain the land for its alleged mineral value.

On careful consideration of all the evidence touching the real value of the land for its mineral deposits, I am in doubt. Witnesses, apparently equally skilled as practical miners and prospectors, and equally honest in their opinions, have prospected the land and differ widely as to the extent and character of the alleged deposits.

As above seen, the evidence of the State in sinking the shaft, and refusing McBride the privilege of examining its output, can not be considered. Even if there were found no gold there in sufficient quantities to pay for mining, it would not prove that valuable deposits are not on other parts of the land. The State, however, did not confine its explorations to that place, but prospected elsewhere, and report no minerals.

The single question of the value and extent of the alleged deposits remains to be determined, and a hearing for that purpose is necessary.

In consideration of the great value of the land, and the importance of an early settlement of this remaining question, the case will be made special, and settled as speedily as possible.

The land should be thoroughly prospected, and a record of the number of pans or pounds treated should be kept, and the quantity, character and value of the precious metals found therein per cubic yard of gravel given. When the tests are completed, the State, having the burden of proof to show the non-mineral quality, will present its testimony, after which claimant may offer his testimony in rebuttal and, in addition thereto, any further testimony he may have to sustain his averments as to the mineral quality of the land.

McBride and his representatives, if they so desire, will be permitted to be present and witness the operations of the State at all stages of the investigations, in exploring the mine and determining the results,

and will award a like opportunity to the representative of the State, should he elect to make further explorations and tests of the quality and value of the gravel.

A special agent of the Department will be detailed to be present at the investigation and carefully note all the proceedings and tests made under this order. He will be present when the testimony is reduced to writing at the hearing, and may be called by either party to give testimony.

The State will proceed to make the explorations and tests as early as practicable, giving to McBride and the local officers due notice when the same will commence.

The decision appealed from is modified.

PRE-EMPTION—PROTEST—PRESUMPTION OF SANITY.

MEFFORD *v.* CARVER.

A protest against pre-emption final proof setting forth that the pre-emptor is of unsound mind, and hence disqualified to perfect his claim, must be dismissed, if the evidence submitted thereunder does not overcome the legal presumption of sanity.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 17, 1894. (W. F. M.)

On March 16, 1889, Melvina D. Carver filed her declaratory statement for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 2, Township 25 S., Range 30 E., of the Visalia, California, land district, and on April 22, 1891, she offered final proof.

Joseph C. Mefford, having made homestead entry of the same land on October 22, 1890, protested against the allowance of Miss Carver's proof, alleging,

1. That said filing by claimant was not made by her for her own use or benefit; nor is her entry now sought to be made for her own use or benefit.

2. That on March 16, 1889, and for a long time prior thereto the said Melvina D. Carver was and still is an idiot and is and was *non compos mentis* and incapable of exercising the pre-emption right, and that she was not and is not a voluntary claimant and has no idea what the nature of her filing or entry has been or will be; that she is simply a tool in the hands of her mother and was procured to file upon said land by and for the benefit of her mother and guardian.

3. That Melvina D. Carver never filed upon nor settled or resided on said land.

4. That said filing by claimant and the entry now sought to be made was and is fraudulent and void for the reason that said filing was made and this entry is sought to be made in fact at the instance of said Mrs.

L. J. Carver and for her use and benefit. And protestant asks that he be allowed to cross examine the witnesses and introduce proof in support of said allegations.

The register and receiver recommended that the protest be dismissed, and that Miss Carver's final proof be accepted.

On appeal to your office her pre-emption filing was held to be void for the reason that "the claimant is shown to have been of unsound mind and understanding," which "disqualifies her as a pre-emptor."

The decisions of your office and of the local office concur in holding that she has complied with the law in the matters of settlement, residence and improvements, and these findings of fact are fully sustained by the evidence.

While one witness, a young man of about the same age as the claimant, and brought up in the same neighborhood with her, swears that she is an idiot, or, in his own inelegant, but expressive phrase, "a natural born fool," the testimony goes to show she is, in a qualified sense, a mental and physical imbecile, a condition brought about by injuries received from a fall in early childhood. It is conclusively shown, however, that she is not devoid of intelligence, and those so circumstanced as to be best qualified to judge of her capacity, declare that she readily comprehends the common affairs of life. I find from the evidence, too, that her physical disabilities are such as would naturally exaggerate, to an observer, her mental infirmity.

I do not think the presumption of sanity, raised by the law, has been rebutted by the evidence touching her mental condition.

The decision of your office is therefore reversed.

INDIAN LANDS—OCCUPATION BY RELIGIOUS SOCIETY.

INSTRUCTIONS.

All the lands occupied by a religious society at the date of the passage of the act of March 2, 1889, may be held by such society, provided it is limited to not more than one hundred and sixty acres in any one tract, and that each separate tract was in actual use for religious or educational work among the Indians at the date of said enactment.

Secretary Smith to the Commissioner of Indian Affairs, March 13, 1894.

I have considered your communication of 1st instant, in which you ask to be advised in connection with a decision of January 29, 1894, of the Hon. Assistant Attorney General for this Department, as to the construction which should be put on the words "not exceeding one hundred and sixty acres in any one tract" occupied by religious societies or other organizations under the provisions of the general allotment act and of the Sioux act of 1889.

In response thereto, I transmit herewith copy of an opinion, dated 7th instant, from the Hon. Assistant Attorney General, to whom the matter was referred, wherein it is held

that all the lands occupied by a religious society or other organization at the date of the passage of said act may be held by such society provided it is limited to not more than one hundred and sixty acres in any one tract.

In this opinion I concur with this proviso: Each separate tract must have been in *actual use* for religious or educational work among the Indians at the time of the passage of said act.

OPINION.

Assistant Attorney-General Hall to the Secretary of the Interior, March 7, 1894.

I am in receipt, by reference of the Acting Secretary, of a letter addressed to the Secretary of the Interior by the Commissioner of Indian Affairs, in which the Commissioner states:

In the decision of the Assistant Attorney-General dated January 29, 1894, page 3, (in which you concurred) the following language occurs: "Construing these provisions of the section, I think it is very clear that Congress meant, in the first instance, that any religious society, in actual occupancy of land at the date of the passage of the act aforesaid, should have the right to have the grant (patent?) issued to such society for *one hundred and sixty acres of land* . . . or in lieu thereof might be permitted to purchase *one hundred and sixty acres* of land and receive . . . (Page 5) . . . (1) A religious society that occupied land . . . could have the land, to the extent of *one hundred and sixty acres*, granted to it."

The Commissioner adds:

From the above quoted words of the Assistant Attorney-General, it is a question in my mind whether the amount of land which any religious society upon any of the Sioux reservations could be granted for religious and educational purposes is not limited "to the extent of one hundred and sixty acres."

The Commissioner then propounds this question:

Inasmuch as the words of the general allotment act relative to the amount of land which can be set apart to any religious society—"not exceeding one hundred and sixty acres in any one tract"—are identically the same in the Sioux act of March 2, 1889; and in view of the fact that the construction heretofore placed upon this language by the office would be incompatible with that held by the Assistant Attorney-General, if his decision is intended to limit the amount of land to one hundred and sixty acres which any society can have on any one reservation, I have the honor respectfully to request that I be advised as to proper construction to be placed on the phrase above referred to, "not exceeding one hundred and sixty acres in any one tract," i. e., whether it is intended to limit the quantity of land any society may have on any one reservation to one hundred and sixty acres, notwithstanding they may have been in occupancy of land, with possibly valuable improvements thereon, at more than one place on the same reservation.

In reply to the question thus propounded by the Commissioner of Indian Affairs, I would call attention to the fact that when the ques-

tion of the rights of religious societies on the Great Sioux Reservation was submitted to me, it was submitted in the form of three queries. The first query was, whether a religious society that was in the occupancy of lands on the reservation at the date of the passage of the act of 1889, could be granted the use of any other lands without purchasing the same. To this query I gave a negative answer. The question as to whether a religious society could take more than one hundred and sixty acres occupied by it, or was limited to one hundred and sixty acres, was not presented to me, and was therefore not passed upon. The second query was, whether such societies not in the occupancy of lands within either of the reservations, could be granted the temporary use and occupancy thereof. To this query I gave a negative answer. The third query was, whether a religious society not in the occupancy of lands on the reservation at the date of the passage of the act should be required to purchase the same. To this query I answered that none but those who were in the occupancy of the lands on the reservation at the date of the passage of the act could claim to use and occupy any portion of the lands, or purchase the same.

It will be seen by a careful reading of the three queries propounded to me, and my answers thereto, that the question as to the amount of lands a religious society could continue to occupy within the reservation was not propounded to me, nor did I consider it at the time I gave the former opinion. That opinion is not intended to deny the right of a religious society to have the use of lands to the extent they may occupy the same, so that the amount does not exceed one hundred and sixty acres in any one tract.

The fifth section of the general allotment act of February 8, 1887 (24 Stat., 388), reads as follows:

And if any religious society or other organization is now occupying any of the public lands to which this act is applicable for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization in quantity not exceeding one hundred and sixty acres in any one tract.

I construe this language to mean that all the lands occupied by a religious society or other organization at the date of the passage of said act may be held by such society, provided it is limited to not more than one hundred and sixty acres in any one tract.

PRACTICE—APPEAL—MOTION TO DISMISS.

MILLER v. YOUNG.

The ten days additional allowed for filing an appeal, when notice of the decision is given by the local office through the mail, may be accorded the appellant whether he uses the mail for transmitting his appeal to the local office, or appears there and files it in person.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 17, 1894. (W. M. W.)

In the matter of the appeal of William H. Miller from your office decision of October 27, 1892, in the case of said Miller v. James A. Young, involving lots 1 and 2, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 33, T. 12, lot 12 of Sec. 5, and lot 14 of Sec. 4, T. 11 N., R. 4 W., Oklahoma City land district, Oklahoma Territory, the attorney for Young has filed a motion to dismiss said Miller's appeal, on the ground that it was "filed out of time."

It appears from the papers and motion in the case, that on November 25, 1892, Miller was notified of your office decision by registered letter from the local officers; that on the 4th day of February, 1892, he, by his attorneys, filed in the local office his appeal from said decision, with service thereof accepted on the same day by the attorney for Young.

It is claimed in support of the motion that the fact that the appeal was filed in the local office, and not transmitted by mail, should operate so as to cut the party out of the "five days additional for the return of the appeal through the same channel" under the rules of practice.

This contention is not well taken. In the case of *Haley v. Harris* (13 L. D., 136), it was held that when notice of a decision is given through the mails by the local office, ten days additional are allowed in which to file appeal, irrespective of the time actually required for the transmission of said notice, and I can see no reason why the party should not have the full time allowed, whether he uses the mail for transmitting the appeal to the local office, or appears there and files it in person.

Allowing Miller the full seventy days, to which he was entitled under the rules, from and after the 25th day of November, in which to file his appeal, it is clear that his appeal was taken in the time allowed under the rules of practice, for, excluding the day on which notice was mailed, in computing the time, his appeal was filed on the seventieth day thereafter.

The motion to dismiss the appeal is therefore overruled, and the case will be disposed of, when reached, on its merits.

HOMESTEAD ENTRY—AMENDMENT.

SAMUEL MEEK.

A homestead entry may be so amended as to include a tract covered by the applicant's settlement and originally intended to be entered, but not so taken on account of misinformation as to its true status.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 17, 1894. (P. J. C.)

The record shows that Samuel Meek made homestead entry September 30, 1891, for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 33, T. 18 N., R. 4 E., Guthrie, Oklahoma Territory, land district. On October 2, following, he filed an application to amend that entry so as to include the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section. In his affidavit he says that when he made his original entry he did not know there was any vacant land adjoining said tract, and he could not ascertain this at the time because of the crowded condition of the land office; that he has since learned the land is vacant. On January 4, 1892, this application was rejected for the reason that—

it does not show that any examination of the land was made before making entry thereof, nor that any precaution was used to avoid error, nor that any attempt was made to ascertain the status of the tract to which he desires to amend to include, at the time of making his said entry, and does not show that any settlement was made on said tract, nor the character, extent, or value of the improvements, and does not show that he has not sold, assigned, or transferred his alleged erroneous entry, nor agreed to do so.

Twenty days allowed to amend.

Again, on February 11, 1892, he filed another affidavit, by which it is shown that on September 23, 1891, he went upon the land that he is asking to have added to his original entry, and put a foundation for a house and built a box house that cost \$50; that he placed a stake with notices on that he claimed the land; that he was informed that this land was an Indian allotment, and did not know any better until after he made the entry; that he could not get into the local office to examine the plats for several days after his entry; that he can neither read nor write, and had to rely on such information as he could obtain; that he has not sold or relinquished the land, or agreed to.

The application was again rejected by the local officers, because "we do not believe applicant exercised diligence to ascertain condition of the tract before making entry, and recommend that the entry be denied." Thereupon, Meek appealed, and your office, by letter of August 13, 1892, affirmed their decision. Meek appealed.

So far as the record before me shows, there is no adverse claim to the forty acre tract applicant is seeking. It seems to me, therefore, that this amendment should be allowed. It appears that the applicant originally intended to include this tract, but, relying on reports that

it was not subject to entry, and being unable, as he swears, to satisfy himself from the records, it was not included in his original entry.

Mr. Secretary Teller, in the case of Crail Wiley (3 L. D., 429), said, in reference to amendments of this sort—

I do not deem it advisable to deny by arbitrary rules the right of settlers to apply voluntarily for such amendments as will enable them to secure the right to their homes, where clerical mistakes or conflicting claims have been made to their prejudice. It is the duty of this Department to aid rather than obstruct the prosecution of settlement rights, and all cases should be fairly heard and adjudged upon their merits, without the restriction of technical regulations.

Your judgment is reversed, and the amendment will be allowed if there be no conflicting claims of record.

SETTLEMENT RIGHTS—HOMESTEAD—UNSURVEYED LAND.

LAUBENHEIMER v. TAYLOR.

The right of a homestead settler on unsurveyed land, if not asserted within the statutory period, is defeated by the intervention of an adverse claim.

A settler on unsurveyed land is charged with notice of the filing of the plat of survey, and the opening of the lands embraced therein to entry.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 17, 1894. (J. L. McC.)

Valentine Laubenhaimer has appealed from your office decision of August 12, 1892, dismissing his contest against the homestead entry of William H. Taylor for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 14, and the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 23, T. 165., R. 6 E., Helena land district, Montana.

It appears from the contestant's affidavit, that in the fall of 1891 he purchased from one John H. Brand his improvements on and interest in the tract known as the "Clendennen Ranch;" that the improvements consisted of breaking, fencing, dwelling-houses, sheds, corrals, and water-rights—said improvements being worth at least fifteen hundred dollars; that all of said improvements, except the breaking and fencing, are upon the land included in the entry of said Taylor; that since the above date the contestant has resided on the land a part of the time, and during other portions of the time has had employes living in the house on the land, improving and taking care of the same; that he has ever since making said purchase, and long prior thereto, intended to enter the land covered by Taylor's entry, except the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 23, which is in the possession of one Charles W. Nelson; that on the 8th of June, 1892, said Taylor made homestead entry of a tract, one hundred and twenty acres of which embraces the land which contestant intended to enter, and would have entered if he had known that it was open to entry. In an affidavit accompanying his appeal contestant further alleges that he "came to Great Falls, and

inquired at several real estate abstract offices, and at other places, and of attorneys and persons residing in said township, and had personal friends and other parties write and telegraph to Helena, Montana, and inquire as to whether said section was open to homestead entry; and that about the 10th or 12th of June, 1892, he learned that said Taylor had on the 8th of that month made homestead entry of the tract. He applied for a hearing at which to show that he had acquired a prior and better right to the land. This application your office denied, on the ground that even if he were to prove all that he alleges, he would not thereby establish a right to the land. He appeals to the Department on the grounds following, in substance:

That the decision is contrary to law and unsupported by any proper consideration of the laws in regard to homestead entries.

This allegation is not sufficiently specific to warrant consideration. (Levi W. Hulbert, 12 L. D., 29.)

That the affidavits filed are sufficient to entitle plaintiff to a hearing; that under every rule and construction of the law applicable to hearing in the land department and all other tribunals the plaintiff is entitled to a hearing.

Sections 2265 and 2266 of the Revised Statutes provide:

Every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known his claim, in writing, to the register of the proper land office within three months from the time of settlement; otherwise his claim shall be forfeited, and the tract awarded to the next settler, in order of time, on the same tract of land, who had given such notice and otherwise complied with the conditions of the law. In regard to settlements which are authorized upon unsurveyed lands, the pre-emption claimant shall in all cases be required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement.

The third section of the act of May 14, 1880 (21 Stat., 140), applied the same rule to claimants under the homestead law.

The plat of survey of said township was filed in the local office some time in October, 1891. The first applicant to enter was Taylor; and his application was properly allowed (see *Pruitt v. Skeens*, 12 L. D., 629).

Contestant further contends that your office decision was erroneous.

Because the Acting Commissioner presumes that the plaintiff had notice of the time at which the township plat was filed.

Your office has instructed the registers at the local offices to employ every practically available means to furnish the public with information as to when the plats are filed in the local office. They are in all cases specifically directed to post a notice of the fact in a conspicuous place in the office; to send a copy of such notice to every postmaster in the vicinity of the land to be "conspicuously posted" in his office; the same to each clerk of a court of record; to furnish it to the "public press" of the land district, as a matter of news; and to "give such further publicity of the matter in answer to inquiries," as they may be able to do by letter, for which they are prohibited from charging any

fee. (See instructions to Registers and Receivers, October 21, 1885—4 L. D., 202.) It is difficult to imagine what further measures could be taken to inform the public that the plat of survey of the township had been filed. The defendant does not allege that these measures were not taken. He must be considered as being charged with notice of the filing of the plat and the opening of the land to entry.

For the reasons herein given, your office decision refusing the application for a hearing is affirmed.

Charles W. Nelson, who claims the forty acres included in Taylor's homestead entry that are not claimed by Laubenheimer has also appealed from your said office decision; and this affirmance will dispose also of his appeal.

TIMBER-LAND—SUBMISSION OF FINAL PROOF.

ROBERT v. BROWNELL.

Public lands valuable chiefly for timber, but unfit for cultivation within the meaning of the timber and stone act, include lands covered with timber, but which may be made fit for cultivation by removing the timber and working the lands. No rights are lost by a timber land applicant through delay in the submission of final proof, where such delay is due to the conditions of business in the local office, and the proof is submitted at the time fixed by the register.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 17, 1894. (G. B. G.)

The land involved herein is the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 32, T. 18 N., R. 7 W., Olympia land district, Washington.

On March 16, 1889, Mrs. Ada M. Brownell filed timber land sworn statement for the purchase of the tract. On April 4, 1890, Louis Robert filed declaratory statement for the same tract, alleging settlement thereon March 31, 1890.

On July 18, 1890, Mrs. Brownell gave notice that she would offer proof before the register and receiver at Seattle, on September 15, 1890. "to show that the described land is more valuable for its timber and stone, than for agricultural purposes, and to establish her claim to said land."

Pursuant to said notice, proof was offered on the date named, and Robert entered protest against its acceptance, alleging that said tract was not chiefly valuable for the timber thereon, and not subject to entry under the act of June 3, 1878, but, on the contrary, was chiefly valuable for agricultural purposes.

Robert made final pre-emption proof December 8, 1890, before the clerk of the superior court of the county within which said land is situated, and on its transmittal to the local office "it was suspended, pending the hearing which was to be ordered on his protest against the timber land proof of Brownell."

A hearing was ordered, which was had June 22, 1891, and on July 8, 1891, the local officers found in favor of Robert. On appeal, by your office letter of June 18, 1892, the decision of the register and receiver was affirmed, but on review, by your office opinion of October 15, 1892, said decision was reversed, the final proof of Robert rejected, and Brownell's timber land statement approved.

The case is now before the Department on appeal of Robert, who assigns as error, substantially, that your office erred in its findings of fact, and in the application of the law. The case presents two questions:

1st. Is the land in controversy subject to entry under the act of June 3, 1878 (20 Stat., 89), known as the timber and stone act?

2d. Did the timber applicant by her laches lose her rights as a prior claimant to this land?

Section one of the act of June 3, 1878 (*supra*) provides:

That surveyed public lands valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale, according to law, may be sold in quantities not exceeding one hundred and sixty acres to any one at the minimum price of two dollars and fifty cents per acre.

The only question of fact in the case at bar, coming within the purview of this section is as to the character of the land.

In the opinion appealed from, I find a lengthy statement as to the comparative value of the land for timber and for agricultural purposes, if cleared, but under the facts in this case, as shown by the record, such comparative values are not material. Under the record it appears that the value of said land for agriculture in its primitive state, was nominal.

In the case of the *United States v. Budd* (144 U. S., 154), it was held (syllabus) that:

Public lands valuable chiefly for timber, but unfit for cultivation, within the meaning of the timber and stone act of June 3, 1878, (20 Stat., 89, C. 151) include lands covered with timber, but which may be made fit for cultivation by removing the timber and working the lands.

This rule has been followed by the Department in analogous cases since the promulgation of the supreme court decision above cited. See *Kelly v. Ogan* (15 L. D., 564), and *Gilmore v. Simpson* (16 L. D., 546), although prior to that time an opposite ruling obtained in departmental adjudications.

It appearing from the evidence, therefore, that the land in question at the date of the filing of appellee's timber land statement, was chiefly valuable for timber, it is held that the land was subject to entry under the act cited.

On the second question, section three of the act of June 3, 1878, cited above, provides that upon the filing of the statement, as provided for in the second section of the act, sixty days' public notice of the application shall be given and that "effect shall be given to the foregoing provisions of this act, by regulations to be prescribed by the Commissioner of the General Land Office."

By circular of July 16, 1887 (6 L. D., 114), section 10, the published notice, required by the third section of the act, must state the time which must be after the expiration of the sixty days of publication, and before ninety days from the date of the published notice.

But by circular of September 5, 1889 (9 L. D., 384), the outgrowth of an emergency from the pressure of business in the Seattle land district, Washington Territory, the ninety days rule was abrogated, and registers were directed to "fix the date for making proof and payment, in the notices furnished by them, in this class of cases, at a reasonable time after due publication, having due regard to the exigencies of business at their respective offices."

The case at bar was one of the cases then pending, and came within the remedial scope of the circular. It appears further, that when Mrs. Brownell appeared at the local office and made her sworn statement, the register informed her that he could not take her proof until September 15, 1890, and that she would lose none of her rights by the delay. Her written notice to submit proof is dated March 16, 1889, and the date for proof given therein, as September 15, 1890.

I conclude, therefore, that the timber land claimant is not guilty of laches, and the judgment appealed from is concurred in.

OKLAHOMA LANDS—SETTLEMENT.

RICE *v.* ALLEN.

One who enters the territory of Oklahoma prior to the opening thereof, in order to secure a starting point near the tract desired, is disqualified thereby as an entryman, though outside of the territorial boundary at the hour fixed for opening the lands therein to settlement.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 17, 1894. (P. J. C.)

The land involved in this appeal is the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ lots 1, 2, 3 and 4 of Sec. 26 and lot 3, Sec. 27, T. 13 W., R. 1 W., Oklahoma City, Oklahoma land district.

The records show that Ulysses G. Allen made homestead entry of said land April 25, 1889, and on June 5, following Andrew J. Rice filed an affidavit of contest alleging disqualification of the entryman to enter lands in Oklahoma by reason of his violation of the President's proclamation in entering said territory prior to 12 o'clock, noon, April 22, 1889. The testimony, with the exception of two depositions, was taken before the local officers, and as a result they recommended the cancellation of Allen's entry, and that contestant be awarded the preference right to enter said land. The defendant appealed, and your office, by letter of October 14, 1892, reversed their decision, whereupon contestant prosecutes this appeal.

It is conceded that Allen was first upon this land on April 22; that he was there when Rice came in sight of the land. The east line of the land in controversy is just one and one-half miles from the east line of the territory, in direct line. From the testimony, there seems to be no doubt but what the run could be made with ease on horseback in from five to seven minutes. Standing alone, the testimony of the contestant is not sufficient to maintain the averments of his affidavit of contest. Neither he or his witnesses saw the defendant on that day until they got within about one-third of a mile of the land; and, the contestant says, it was then about six and one-half minutes after 12 o'clock. The testimony relied upon by the contestant to support his charge of disqualification of Allen, is that when he—Rice—got to the land, he found a foundation of six logs; they had been lightly hewed, "were notched and saddled, all fresh work," that had the appearance of having been done within three hours; the logs looked as if they had been there some months. It is also shown that Allen had been seen upon the land at the point where this foundation was in December, 1888, and had hauled the logs and laid them up as a pen, and they were not then notched. There are many contradictory statements in the testimony of contestant, and his witnesses, which tend to cast a doubt in the mind as to what was seen by them on the land on the 22nd in connection with Allen. I deem it unnecessary, however, to comment on them.

The turning point in this case is the defendant's testimony. He admits being on the land in December, 1888, and that the logs were there, as stated by contestant's witnesses. He says that on the morning of the 22nd, he was at the house of one Tacy, in what is called the Pottawatomie country; that he left there about 11:30 A. M., went north and crossed the Canadian River on the SE. $\frac{1}{4}$ of Sec. 1, T. 12, R. 1; then went northeast about one-quarter of a mile, then north in the "Kickapoo country" to a point two hundred or three hundred yards north of the NE. $\frac{1}{4}$ of Sec. 36, T. 13, R. 1, and from that point—outside of Oklahoma—he started in the race at 12:01 by his own time, and got to the land about 12:06 o'clock when he went to the foundation, notched one log and turned it down. His statement as to what he did at the foundation is fully corroborated by his witnesses, and the testimony of the contestant on this point is satisfactorily disproved.

The ford at which he crossed the river is in Oklahoma Territory. An examination of the plat in your office shows that the river runs along the eastern side of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 1, T. 12, R. 1, a little ways west of the east line, and passes out of said section at the northeast corner of the SE. $\frac{1}{4}$. Therefore, it was at some point in this NE. forty that Allen crossed the river, and thus was in Oklahoma prior to 12 o'clock, noon of that day. The testimony shows that this was the only ford on the river within three miles at which a crossing could be made on horseback at the stage of water that then existed.

The question is: Was this such an entrance into the territory as dis-

qualified Allen from making an entry of land in Oklahoma? During the period prohibited by law and the President's proclamation, Allen was not in the territory, except as above stated. Prior to the passage of the law he had been there, and had been upon the land. He thus knew the identical point to which he intended going, and to enable him to reach the land in the quickest possible time, he invaded the forbidden territory, and thus violated both the letter and spirit of the law in getting the position from which to make a speedy run. I think, therefore, that Allen is disqualified from making an entry in Oklahoma.

Your judgment is reversed.

SURVEY—CONTRACT—ADDITIONAL COMPENSATION.

FRANCIS B. JACOBS.

A deputy surveyor can not claim additional compensation for work done, on the ground that the land surveyed was of a different character from that represented in the field notes, unless it is satisfactorily shown that the field notes are incorrect and justly subject to amendment.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 19, 1894. (W. M. B.)

Referring to your letter of October 28, 1893, transmitting the record in the matter of certain public surveys in Arizona, executed by Francis B. Jacobs under contract No. 17, of date May 25, 1891, and special supplemental instructions, I am fully convinced by the evidence furnished by said record that you did not err in refusing to further adjust said account, and in declining to recommend payment of balance alleged to be due, on the ground of irregularity and informality of said account.

Thereupon, on August 16, 1893, the attorneys of Jacobs appealed from your said action to this Department; the chief material allegations of error being that "it was error to ignore the additional evidence filed, showing that the land covered by said surveys was largely mountainous and timbered;" and further, "that the deputy was not allowed the full pay for the character of the work that he performed."

The plaintiff also complains that in your decision you did not state wherein said account was irregular and informal.

The record in this case shows that on July 27, 1893—more than three months after the original account had been adjusted, and two months after the last payment had been made thereon and the account closed—deputy Jacobs, through his attorneys, sought to reopen the matter by filing a restatement of account, which, however, was not verified by, and did not receive the approval of, the surveyor-general of Arizona.

The total amount of the original account is ascertained to be

\$1538.56; total of restated account, \$1946.63; balance claimed to be due, \$408.07.

The contract under which the work was done stipulated for the payment of the minimum rates (\$9, \$7, \$5) of mileage for the survey of meridian and meander; township exterior; section or subdivision lines, respectively, except where the lines of survey pass over lands that are "mountainous, heavily timbered, or covered with dense undergrowth, in which event the intermediate rates (\$13, \$11, \$7) of mileage were to be paid for similar lines passing over lands of stated character.

The contract stipulates, *inter alia*, the following—

It is further agreed by and between the parties to this agreement that no accounts shall be paid unless properly certified by the said surveyor-general (or his successor in office) that the surveys are in accordance with the instructions herein referred to and the provisions of this agreement, and until the approved plats and certified transcripts of field notes of the survey for which the accounts are rendered are filed in the General Land Office.

The account under said contract, for \$1538.56, which was examined, compared with the field notes, and properly verified and approved by the surveyor-general, was based upon and made out in accordance with the entries made in the field book during the progress of the survey, giving a minute and full description of the character of the land, at the end of each mile, over which the lines of survey passed, and the correctness of the field notes cannot be impeached by the evidence of such *ex parte* affidavits which have been introduced into this case, said affidavits only going to show in a vague and general way the conformation of the earth's surface in the district or section of country to which the surveys relate. Said affidavits do not undertake to point out wherein any one or more entries in the field book, relative to the descriptive character of the land over which the lines of survey passed, are incorrect, nor do they attempt even to approximate the number of miles of lines of survey which passed over mountainous or timbered lands.

"The correctness of an official report as to what is shown by the field notes of survey will be presumed, in the absence of competent evidence to the contrary." (*Ex parte* State of Alabama, 9 L. D., 458.)

As stated, contract No. 17 stipulated for the payment of the intermediate rates (\$13, \$11, \$7) of mileage, in cases where the lines passed over lands that were "mountainous, heavily timbered, or covered with dense undergrowth."

In the account originally filed, and approved by the surveyor-general, for the survey of section or subdivision lines, the intermediate rate of \$7 per mile is charged for only one mile and a half of lines passing over lands, designated in field notes, of mountainous, heavily timbered, or covered with dense undergrowth character, and the minimum rate (\$5) of mileage is charged, in said account, for two hundred and ten miles and a fraction of a mile, where lines of survey pass over ordinary

lands, as shown by field notes; while in supplemental account said intermediate rate (\$7) is charged for one-hundred and forty-five miles and a fraction of a mile; of lines claimed to have passed over lands of such mountainous and timber character, and the minimum rate (\$5) charged for only sixty-seven miles and a fraction of a mile of lines claimed to have passed over lands of ordinary character. These and other changes made in the charges for the survey of standard and township exterior lines, which said changes were based upon a description of the land in supplemental account, different from that given in original account and at variance with field notes, makes the balance of \$408.07 claimed by the attorneys of Jacobs as still due.

The allegation that the deputy has not been allowed full rates of mileage for the character of work done is not well founded. He claims in his supplemental account no higher rates than were stipulated in his contract, and allowed upon settlement, nor does he claim in said account that the lines of survey passed over a character of lands different from those designated in said contract.

Plainly stated, the deputy surveyor claims the additional sum of \$408.07, after all the terms of the contract had been complied with on the part of the government, and the account under said contract had been paid in full and closed, upon the sole ground that there was really more land of a mountainous and timbered character surveyed than is shown by the field notes; in other words, that the entries in the field book affecting the descriptive character of the land were imperfect and incorrect.

In all cases relating to the proper execution of a survey, the field notes are the highest evidence respecting the class and character of the land surveyed, and deputy surveyors are estopped thereby from claiming additional compensation for work done, upon the ground that the land surveyed was of a different character from that represented in the field notes unless it is shown to the satisfaction of the surveyor-general and the Commissioner of the General Land Office, or this Department, that the field notes are incorrect and justly subject to amendment. Evidence furnished by *ex parte* affidavits of such a general character touching matters of this particular nature is deemed incompetent for such a purpose.

For the above reasons, which I deem sufficient, your decision is hereby affirmed.

TOWN SITE SETTLEMENT—CEMETERY.

PAYNE TOWNSITE *v.* MICK ET AL.

The law does not prescribe the number of acres that may be taken as the site of a town containing less than one hundred inhabitants. In such cases the extent of acreage is a matter of executive discretion, and is restricted to the land actually occupied for town purposes by legal sub-divisions. Town site settlers may properly set apart a portion of the land covered by their entry for burial purposes.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 21, 1894. (C. W. P.)

I have considered the appeals taken from the decision of your office of May 18, 1893, in the case of Townsite of Payne *v.* William Mick, *et al.*, involving title to the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and lots 2, 3 and 4 of Sec. 2, T. 13 N., R. 2 E., Guthrie land district, Oklahoma, rejecting the application of Early B. Guthrey for the SE. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 2, T. 18 N., R. 2 E., but allowing him to amend his application so as to embrace only the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, and in that event holding that his application should be allowed, and allowing the application of David M. Wood for the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and lots 2 and 3 of said section, but rejecting his application to enter lot 4 of said section.

I have read the record and find that the decision of your office contains a correct statement of the facts.

August 10, 1889, Patrick H. Guthrey filed an application to enter the tract of land first above described, as the townsite of Payne. July 20, 1890, the local officers transmitted to your office a plat, representing the whole thereof. October 31, 1891, Early B. Guthrey filed his said homestead application, and November 2, 1891, Wood made his homestead application.

The townsite application was filed under the provisions of the act of Congress providing for the settlement of Oklahoma Territory. The regulations of this Department issued thereunder (8 L. D., 336, Par. 3) April 1, 1889, provides for applications for townsite entries, in the absence of officers properly qualified to make entry, in trust for the inhabitants; which provisions were pursued in the case at bar. The law does not prescribe that any number of inhabitants is necessary to make a townsite entry, nor does it prescribe the number of acres that may be taken as the site of a town containing less than one hundred inhabitants. In such cases the extent of acreage is a matter of executive discretion, and is restricted to the land actually occupied for town purposes, by legal subdivisions. Woodruff Townsite (15 L. D., 205); Bickel *v.* Irvine (10 L. D., 205); Coyne *v.* Townsite of Crook (6 L. D., 675).

There is no law authorizing entry of lands by towns not incorporated for cemetery purposes, but it seems to be proper that every town, whether incorporated or not, should set apart land for a burying-place. The evidence in this case shows that the settlers of Payne set apart a portion of lot four for burial purposes, and I think they were entitled to do it.

I see no reason for disturbing the decision of your office, and it is accordingly affirmed.

RAILROAD GRANT—SETTLEMENT RIGHTS.

NORTHERN PACIFIC R. R. Co. v. THERRIAULT.

Where the facts and circumstances surrounding the use and occupancy of land are such as to overcome the presumption that the occupant intended to claim the tract under the public land laws, the occupancy must be regarded as a mere trespass, and not sufficient to except the land covered thereby from the operation of the grant to this company.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 21, 1894. (E. W.)

The Northern Pacific Railroad Company moves a review and reversal of departmental decision of July 7, 1893, in the case of said railroad company against Paul Therriault (unreported), involving the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 31, T. 14 N., R. 20 W., Missoula, Montana.

The decision complained of affirms that of your office in sustaining the homestead entry of defendant, made on the 8th day of May, 1886.

At the date of the act granting lands to aid in the construction of said road, July 2, 1864 (13 Stat., 365), the land in controversy seems to have been unincumbered.

On February 8, 1872, Andreas Kawderer made homestead entry upon the same, which was canceled July 24, 1879.

The next entry upon the land was made July 28, 1885, by Peter Hamel who relinquished the same on May 8, 1886, on which last mentioned day, the present claimant made homestead entry.

The map of general route was filed February 21, 1872, and that of definite location was filed July 6, 1882, each of which maps embraced the land in question.

The third section of the above mentioned act, among other things, provides for the granting of

ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office.

The rights of plaintiff are, therefore, determined by the legal status of the land on the 6th of July, 1882, on which day its map of definite location was filed.

In the decision complained of it is held as follows:

At a hearing duly ordered before the register and receiver to determine the rights of the respective parties, at which they appeared, the local officers found that the land was excepted from the withdrawal of February 21, 1872, on general route for the benefit of the company by the valid subsisting homestead entry of Andrew Kawderer, and that it was continuously occupied and cultivated by a person duly qualified to enter the same under the settlement laws at the date of the definite location of the line of the company's road opposite said land on February [July] 6, 1882, and they recommended that said Therriault be allowed to make final proof in support of his entry. (L. and R. copybook 269, page 387.)

The duly qualified person referred to as having continuously occupied and cultivated said land, at the date of the definite location of the line of said road, is one Batiste Rouiller, who was a witness on the trial before the register and receiver.

On cross-examination Rouiller swore as follows: (Testimony, page 7.)

Q. Are you acquainted with the land in question? You may state how long you have known this land.

A. I moved in there in the fall of 1881.

Q. Did you live on the land in question?

A. I did not live on the land in question but I had it fenced in with mine.

Q. Did you ever make any filing upon this land.

A. No, I never filed on it.

Q. Had you used any of our government rights previous to July 6, 1882?

A. I have used my pre-emption right where I am now, but my homestead right I have never used.

Q. You may state how far you live from the land now in question.

A. A little over a quarter of a mile.

Q. Did you lay claim to the land in question in July 6th, 1882, more than having it fenced with the other lands now claimed by you?

A. No, not any more than having it fenced with mine.

Q. Did any one else lay claim to this land?

A. No; it was fenced by another man and I bought the improvements.

Q. Were you a lawful citizen of the U. S. on July 6, 1882, at the time you had this land enclosed?

A. I had my first papers. I sent back to the states for my first papers and it was three or four years before I could get them.

Q. Then on July 6th, 1882, you did not have your second papers?

A. No, I did not.

In the case of the Northern Pacific Railroad Co. v. James L. Morse (L. and R. copybook 201), it was held that—

The term "claims or rights" as used in the act means such as were being asserted at the date of definite location. Such assertion may be actual or presumptive. Actual, as in the case of a settler; presumptive, as, where a qualified entryman, though not an actual settler, is in the use and occupation of the land, the presumption, in the absence of any evidence to the contrary, is that such use and occupation is within the intention of claiming it under some one of the land laws (See as bearing on this point *Jones v. Kirby*, 13 L. D., commencing at bottom of page 703).

If however, the facts and circumstances surrounding such use and occupation are such as to overcome the presumption that he intended to claim the tract under the land laws, then such occupation must be regarded as a mere trespass and would not serve to except the land from the grant.

The above ruling is a modification of the Bowman case (7 L. D., 238), and seems to be more in harmony with sound principle.

The testimony of Rouiller when considered in the light of the rule just recited, places him in the position of a mere trespasser upon the land in dispute, at the date of definite location, and gives Therriault no sufficient legal standing to defeat the claim of the plaintiff, under the granting act before mentioned.

The motion is thereby sustained and said decision is hereby set aside.

SUSPENDED ENTRY—ASSIGNMENT OF DESERT ENTRY—RELINQUISHMENT.

MAUDE *v.* MATTSON.

During the pendency of a departmental order suspending an entry the local office is without authority to accept the relinquishment of said entry and allow the filing of another for the land embraced therein; and all action of the local office and General Land Office, during the pendency of such order, in recognition of a filing so allowed is without jurisdiction and void.

Prior to April 15, 1880, the assignment of a desert land entry was recognized by departmental regulations, and the right of such an assignee can not be defeated by a subsequent relinquishment executed by the entryman; nor does the purchaser of such a relinquishment, who is allowed to file a pre-emption claim for the land, occupy the status of an innocent purchaser who can plead want of notice of the previous assignment.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 21, 1894. (E. W.)

A. C. Maude presents a motion for review of departmental decision in the case of A. C. Maude, transferee *v.* O. C. Mattson, made June 24, 1893 (unreported).

Said motion is predicated upon the following grounds, to wit:

First. It was essentially and wholly wrong to have considered the abstract of title and other *ex parte* papers filed in your office by counsel for Mattson. Their filing and reception was contrary to the rules of practice and their substance was not germane to the issue involved in the case.

Second. It was an erroneous statement of fact to hold that the verity of said papers was not denied when we protested against their remaining in the case, and were advised officially that our protest would receive due consideration.

Third. It was an erroneous conclusion in fact to find any conflict between said papers and the testimony of Maude or to charge him on such evidence with "reckless swearing."

Fourth. It was error of law to hold Maude negligent in not placing his assignment of Cover's desert land entry of record.

Fifth. It was error of fact in holding that Mattson did not receive due personal notice of the transfer of Cover's claim to Maude.

Sixth. It was fundamental error of law not to find that Cover having parted with his interest to Maude, could not transfer subsequently any right to Mattson. Consequently Mattson could by no possibility set up a claim of want of notice.

Seventh. It was error of law to find that the mere want of notice of transfer could invest Mattson with a right which by all laws he did not and could not secure by transfer from Cover. By such transfer he admittedly took nothing. Consequently notice or want of notice could not invest him with any greater rights.

Eighth. It was error of law to hold that pending the suspension of Cover's entry before your office, it was necessary for Maude to file notice of transfer in the local office. Under accepted rulings those officers were entirely without jurisdiction and the void relinquishment of Cover would not invest them with jurisdiction.

Ninth. Having reversed the Commissioner's ruling and found that Cover legally transferred this land to Maude, that Maude was not required to irrigate or reclaim it until the entry had been released from suspension, and that the entry was so suspended before you from 1877 to 1891, it was error to hold any proceedings could legally be had before the local office or the Commissioner touching its validity, or transfer.

Tenth. It was error to have held Mattson the more innocent of the two or entitled to any consideration.

Eleventh. It was error to have canceled Cover's desert land entry.

A brief recital of some of the facts in the history of the case is not inappropriate.

It appears that Cover made entry May 28th, 1877, and on July 31, of the same year, assigned the same to Maude. On September 28, of the same year, the Secretary of the Interior suspended this, with a large number of other desert-land entries, because of the alleged fraudulent character of said entries.

On May 6, 1886, Cover executed a relinquishment of his entry, making affidavit that he had not theretofore relinquished or assigned to any person. On May 11, 1886, the local officers canceled Cover's entry and allowed Mattson to file his pre-emption declaratory statement for the land, in which he alleged settlement on the 20th of April of the same year.

On June 6, 1887, Mattson made final proof and entry, which was subsequently, on the 28th of September of the same year, held for cancellation on an *ex-parte* showing by Maude. December 28, of that year, the order holding said entry for cancellation was rescinded and a hearing ordered to determine the respective rights of Maude and Mattson.

This hearing was had in March, 1890, and on September 15, there-

after, the local officers found in favor of Maude and recommended that the cash entry of Mattson be canceled; that the cancellation of the desert-land entry of Cover be set aside, his relinquishment held for naught, and the desert-land entry be re-instated for the use and benefit of Maude.

Your office decision of May 9, 1892, overruled that of the local officers, and the departmental decision under review sustained the finding of your office.

In my opinion the motion should be sustained. The decision of the local officers in this case was made on the 15th of September, 1890. At that time Mattson had no legal standing whereby he could acquire any title or right to the land in controversy.

The departmental decision complained of, in showing the status of the land in dispute, as disclosed by the record, recites that, "September 28th, of the same year—meaning 1877—the Secretary of the Interior suspended this, with 336 other desert land entries, in the Visalia district, because of the alleged fraudulent character of said entries. Said order of suspension was revoked by this Department January 12, 1891, in the case of *United States v. Haggin*, 12 L. D., 34."

On May 6th, 1886, J. W. Cover, the original entryman, whose entry was suspended under the terms of the order just above mentioned, executed a relinquishment, having sold the same to Mattson.

Mattson, presenting said relinquishment at the local office, was allowed, on May the 11th, 1886, to file his pre-emption declaratory statement for the tract, on which he alleged settlement on the 20th of April of the same year. On June 26, 1886, the local office canceled the desert land entry of Cover.

The judgment pronounced in the decision complained of is in these words: "Mattson's final proof shows compliance with law, and you will direct that patent issue to him."

It will be observed by reference to the facts above recited, as disclosed by the record, that Mattson purchased a relinquishment, filed upon the land, and had his supposed rights thereunder adjudicated by the local officers during the period covered by the suspension emanating from this Department, which took effect in September 1877, and was revoked in January 1891.

During that whole period the local officers had no jurisdiction to allow a filing, or to adjudicate any question relating to the land in controversy.

It will be remembered that the decision complained of relates to the legal status of Mattson, not at any time since the revocation of said order of suspension, but on the 15th day of September, 1890, when the local office heard the case.

The controlling principle in the case of *Adams v. Farrington*, 15 L. D., 234, is likewise applicable in this case, the entry of Farrington being included in the same order of suspension as the case at bar.

Farrington made entry in April, 1877. Adams initiated contest in 1886, and during the same year the case was tried in the local office. In that case the Department says:

All these entries having been suspended by the Department, jurisdiction over the cases and over the land was removed from the local office and from your office, as effectually as if the cases were pending before the Department upon appeals from judgments rendered therein by such offices.

There is also this further ruling in said case, to wit:

My conclusion is, that the local officers acquired no jurisdiction whatever by their proceedings upon the contest application of Adams.

I deem it unnecessary to cite authorities in support of the proposition that where jurisdiction is wanting no default is possible upon the parties litigant. It follows, therefore, that Farrington lost no rights by not appearing at the hearing appointed by the local officers, and in not appealing from the judgment rendered by them. Their whole action in the case was a nullity, and your affirmance of their judgment did not render valid that which was void from the beginning.

If the decision in the case just quoted from is to be regarded as law in this Department, then it follows that the action of the local officers in allowing the filing of Mattson was a nullity.

In the decision sought to be reviewed, on page five, occurs the following statement:

The only question in my opinion to be considered, and the one upon which this judgment must rest, is: Did Mattson, at the time of his purchase of the relinquishment of Cover, have any knowledge, actual or constructive, of the transfer of the entry to Maude.

In order to show the significance of the proposition above quoted it is proper here to state, that Cover made entry in the early part of 1877, and assigned the same to Maude in July of the same year, by endorsement on the receiver's certificate, acknowledging receipt of first payment.

This was done a short time before the order suspending the entries.

Mattson in his controversy with Maude claims to have had no notice of the assignment to Maude, and the case is made to turn upon the question as to whether he is an innocent purchaser without notice.

It needs only to be mentioned, in order to be accepted, that the purchaser of a relinquishment acquires no rights whatever, and least of all would such a purchase supply a legal foundation upon which to base the rights of an innocent purchaser. Mattson could not have instituted any proceedings before the local office whereby he might have acquired any rights touching the land in controversy until the 12th of January, 1891, the date of the revocation of the suspending order, and by that time he, according to his own showing, had ample notice of the assignment to Maude.

It seems to me further that the decision under review is in direct contravention of the principle laid down in the case of *Sharp v. Harvey*, 16 L. D., 166. The land in controversy in this case was covered by the suspending order hereinbefore mentioned, and was likewise

assigned before the date of said order. During the period included in the suspension Sharp initiated contest, pending which, Harvey's relinquishment made in 1885, was offered at the local office.

In this case it is held: that long prior to the 15th of April, 1880, Van Valer became the assignee in effect of the entry of Harvey. After the 13th of June, 1877, the date of the deed from Harvey to Van Valer, the former ceased to have any interest in the entry, or the land covered thereby, and his pretended relinquishment, executed on the 28th of April 1885, could neither deprive Van Valer of his rights in the land nor confer any rights therein upon Sharp.

Now it will be remembered that the assignment to Maude was made prior to the 15th of April, 1880, at a time when such assignments were recognized by the Department, and Mattson's purchase was made after that date. If his purchase therefore be treated as an assignment, it is void. If treated as the purchase of a relinquishment, he acquired no rights thereby. The local officers having no jurisdiction to allow his entry, that is also void.

It seems to me, therefore, that Mattson not only has no standing as an innocent purchaser, but that he is not a purchaser in legal contemplation at all.

I note, too, that it is conceded that the assignment to Maude was legal, and regular, and was valid as between him and the entryman, though not recorded. Yet because of his failure to record the same, it is set at naught by the opinion under review, in behalf of a litigant whose every act concerning the property in dispute was void.

It would be a strange legal anomaly to hold that a void proceeding could under any circumstances supercede or defeat a right based upon a contract conceded to be lawful. Now did the local office have jurisdiction even to accept the relinquishment of Cover, and thereupon to cancel his entry? It is unnecessary to determine whether or not a relinquishment might have been legally made in the absence of a prior assignment, but it is held substantially in the case of *Sharp v. Harvey*, above mentioned that,

Prior to April 15, 1880, the assignment of a desert land entry was recognized under departmental regulations, and the right of an assignee under an assignment made prior to said date, cannot be defeated by a subsequent relinquishment of the entry executed by the entryman.

The contention of Mattson is, however, that he purchased without notice either actual or constructive, and for that reason the rule above recited does not apply to him.

Now can it be said with any semblance of legal reason that Mattson in buying something which he knew would confer no rights upon him, was entitled to notice of any sort?

At the moment of the presentation of Cover's relinquishment at the land office, and at the moment of the subsequent cancellation thereof, Mattson's legal standing was the same as that of any other qualified entryman in the United States. The fact that he had purchased the

relinquishment did not give him, or any body else, any right to notice of a former assignment.

It may be contended that at the time of his filing on the land his right to notice attached, but this can not be maintained upon principle. It is held, substantially, in the case of *Smith v. Orton* in 21st Howard, 241, that to make a person a *bona fide* purchaser of land without notice, the conveyance must be by deed, and the vendor must be seized of the legal title, and the purchase-money, must, in fact, have been paid before notice.

In the case of *Vattier v. Hinde* (7 Peters, 252), it is held that the rules of law respecting a purchaser without notice are formed for the protection of him who purchases a legal estate, and pays the purchase-money, without a knowledge of the outstanding equity.

It follows, therefore, that if notice reaches the second purchaser before he has paid the purchase-money, he can not acquire the status of a *bona fide* purchaser without notice.

It will be observed in this connection, that Mattson had notice within one month from the date of his filing, long before he made final proof or paid one cent for the land.

This view of the matter is strengthened by considering the nature of the suspending order, the object of which was to ascertain by investigation the character of the lands included in the suspended entries. Supposing that the claim of Maude was eliminated from the record of this case, and that some other person had applied at the local office to enter said land under the desert land laws, prior to Mattson's appearance, would the first applicant have been allowed to proceed in the face of the fact that the lands were then segregated, so to speak, by the government to ascertain whether they were desert lands or not? Certainly not. In order to consummate the object contemplated by the order of suspension, it was necessary to remove or suspend the jurisdiction of the local office over the lands to which said order related. If the local office had no jurisdiction to allow proceedings to segregate such lands under the desert land laws, it follows, necessarily, that there is an absence of jurisdiction for all purposes.

The decision under review is made to turn upon a question of fact, and the conclusion arrived at is different from that of the local officers; and *ex parte* testimony, brought to the attention of the Department pending the appeal, is considered for the purpose of impeaching the testimony of plaintiff in the hearing before the register and receiver.

In view of the fact that witnesses appear in person at the local office, where their manner of testifying and their appearance and conduct are justly considered in arriving at the truth, the judgment of the register and receiver ought not, ordinarily, to be disturbed in questions of fact.

I am of the opinion, therefore, for the reasons hereinbefore stated, that want of notice to Mattson either at the time of his purchase or filing, does not put him in the legal attitude of an innocent purchaser without notice.

I deem it unnecessary to notice the criticism upon the conduct and testimony of Maude in concealing the fact that he had conveyed his interest after assignment, to some one else.

It is not material, under the view which I take of the case. The record discloses no legal reason why patent should issue to Mattson.

The decision of June 24, 1893, is accordingly vacated. The entry of Mattson will be canceled, and the desert-land entry of Cover re-instated subject to the assertion of any adverse rights or charges affecting the validity thereof.

The motion is therefore sustained.

HOMESTEAD ENTRY—PRELIMINARY AFFIDAVIT.

WILLIAM K. SHORT.

The preliminary affidavit (form 4-102 b,) required in all entries made since August 30, 1890, cannot be received if made outside of the land district in which the land is situated; but in the absence of any adverse claim in such a case, the applicant may file a new affidavit properly executed.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 17, 1894. (P. J. C.)

The land involved in this appeal is the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 23, T. 37 N., R. 21 W., Springfield, Missouri, land district.

It appears that William K. Short made homestead entry of said tract January 8, 1891. His "homestead affidavit" (form 4-089), was made before the clerk of the circuit court December 23, 1890, and his homestead application (form 4-007) before the register at Springfield January 8, 1891. These seem to be the only papers filed, and, as appears by your office letter of October 8, 1892, your office required additional affidavits to be filed in this, and other, cases, and the same not being filed in this case, the entry was "held for cancellation for non-compliance with the law." Short filed an affidavit in the form of an appeal, by which it is shown that he was temporarily absent from the land from March to November, 1892; that on March 24, 1892, he executed the affidavit "to be used in all entries since August 30, 1890," (form 4-102 b) before the clerk of the district court of Oklahoma Territory, and on December 16, 1892, he executed the "homestead affidavit" (form 4-063) before the clerk of the circuit court of Polk county, Missouri, the county in which the land is situated. It is not shown affirmatively that these affidavits were filed in the local office, but his endeavor to comply with the order is certainly manifest, and in the absence of any showing to the contrary, it will be assumed that they were so filed.

The affidavit (4-102b), made before the clerk of the district court of Oklahoma, cannot be received, because made outside of the land district in which the land is situated; but in the absence of any adverse claim to the land, I think the entryman may be permitted to file a new

affidavit, so constructed as to show his qualifications at the date of his entry, and upon filing this, together with the other, his entry may stand.

Your office judgment is therefore reversed.

TIMBER CULTURE CONTEST.—COMMUTATION.

BUTLER *v.* GEER.

The withdrawal of a contest during its pendency on appeal before the Department leaves the issue as between the entryman and the government.

The right to commute a timber-culture entry under section 1, act of March 3, 1891, is limited to persons who can show compliance in good faith with the timber-culture law for a period of four years.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 17, 1894. (J. L. McC.)

On May 1, 1893, this Department rendered a decision in the case of Walter Butler *v.* Russell Geer (unreported), holding for cancellation the timber-culture entry of the latter for the SW. $\frac{1}{4}$ of Sec. 11, T. 152, R. 51, Grand Forks land district, North Dakota.

In said case, the local officers found in favor of the contestant; your office reversed the judgment of the local officers and found for the defendant; the Department reversed your office decision and found as follows:

The contestant testifies that the ground previously broken on the land had, when he first saw it, three years before the hearing, grown up in grass; and his witnesses testified in effect that such grounds, during the year preceding trial, was sodded over. They all testify that, during their acquaintance with the land, it presented no signs of cultivation, and that no trees were visible thereon. The testimony thus outlined shows that the claimant was in default of the statutory provision by which he was required to keep the trees (which he claims to have planted during the first years of his entry) in a healthy, growing condition. . . . It follows that the contestant is entitled to a judgment of cancellation. Geer's entry will accordingly be canceled. . . . On May 28, 1891, Geer submitted commutation proof (now before you on Geer's appeal from rejection by the local officers) under the act of March 3, 1891 (26 Stat., 1095), showing that about June 1, 1890, he replanted eleven acres of the land in tree seeds. . . . It seems, however, from Geer's own statements, that before such replanting he was informed of Butler's contest. The default charged by Butler cannot therefore be said to have been cured before the initiation of his contest. The proof submitted as aforesaid is of course subject to the rights of Butler as contestant. This being so, such proof must be, and is hereby, rejected.

The motion for review is as follows:

W. J. Anderson, being duly sworn, deposes and says that he is the attorney of Russell Geer in the above entitled action; that he hereby applies for a review under Rules 77 and 78 of Practice. This application is not made for the purpose of annoyance or delay, but with object asked in review; and as a reason for making the request I will state that, all protest to the consummation of the entry having been withdrawn, it appears to me to be the bounden duty of the Department to direct that the entry be allowed without prejudice.

In connection with the above motion for review your office transmits Butler's withdrawal of his contest against Geer. The withdrawal was executed and filed in the local office at Grand Forks, North Dakota, on April 27, 1893—four days before the date of the departmental decision in question. This withdrawal simply takes the contestant out of the case, and serves as a waiver of his preference right to the land; the question remains as between the entryman and the government still to be decided. (*Taylor v. Huffman*, 5 L. D., 40; *Hegranes v. Londen*, ib., 385; and many cases since.)

It is not, therefore, in the language of the applicant for review, "the bounden duty of the Department to direct that the entry be allowed without prejudice;" its duty is to deal with the question of the commutation of Geer's timber-culture entry, in view of the facts of record, irrespective of the preference right that the contestant would have had in case he had not withdrawn from the contest.

The first section of the act under which the entryman claims the right to commute contains the following proviso:

Provided, That any person who has made entry of any public lands of the United States under the timber-culture laws, and who has for a period of four years in good faith complied with the provisions of said laws, and who is an actual and *bona fide* resident of the State or Territory in which said land is located, may be entitled to make final proof thereof, and acquire title to the same, by the payment of \$1.25 per acre for said tract, under such rules and regulations as shall be prescribed by the Secretary of the Interior. (26 Stat., 1095-6.)

Geer's commutation proof showed that about June 1, 1890, he replanted eleven acres of the land in tree-seeds. The departmental decision heretofore rendered found that three years before the hearing the tract was "grown up to grass," and that during the year preceding the trial the ground was sodded over; and the correctness of the finding is not denied in the motion for review. The commutation proof was offered May 28, 1891. The gist of the question in issue, then, is whether compliance with the law from June 1, 1890, to May 28, 1891 (somewhat less than one year), warrants the commutation of a timber-culture entry under an act which limits the privilege of commutation to persons who can show compliance with the timber-culture laws "for a period of *four years*?"

In my opinion, the entryman is not in a position to claim the advantage of the commutation proviso of the first section of the act of March 3, 1891.

To hold that he could do so, under the circumstances set forth, would open the door to allow any person, who had wholly failed to comply with the requirements of the law for years, to break five acres of his claim, and the next week, or the next day, demand the privilege of commuting, on the ground that more than four years had elapsed from the date of his entry, and that by beginning at that late day the work demanded by the timber-culture laws he had "cured his laches." But although the entryman is not now in a position to commute his entry, yet, in

view of the withdrawal of the contest, and of the possibility that he may hereafter, within the thirteen years allowed him in which to make final proof, show substantial compliance with the requirements of the timber-culture law, I see no reason why his entry should not be for the present held intact. The departmental decision heretofore rendered is therefore modified as above indicated.

TIMBER CULTURE ENTRY—COMMUTATION.

CASSADY v. EITELJORG'S HEIRS.

The right to commute a timber culture entry under the amendatory act of March 3, 1891, is dependent upon compliance with law up to the time when application is made to commute.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 17, 1894. (J. L. McC.)

I have considered the case of George Cassady v. The Heirs of Henry Eiteljorg; involving the timber culture entry of said Eiteljorg for the SW. $\frac{1}{4}$ of Sec. 29, T. 155, R. 64, Devil's Lake land district, North Dakota.

The entry was made February 11, 1884.

George Cassady filed affidavit of contest January 4, 1892, alleging:

That the said land is now all grown up to weeds and sod; that there were ten acres broken in 1884, and nothing has been done since, no trees, tree-seeds, or cuttings have been planted or cultivated on said land, and none growing at this time; and said default still exists.

A hearing was held, as the result of which the local officers found for the contestant, and recommended the cancellation of the entry. On appeal, your office affirmed their judgment. Thereupon, the counsel for defendants appeals to the Department.

The appeal is based upon numerous grounds, that are mainly technical. Counsel contends that the local officers never acquired jurisdiction over the defendant, notice having been given by publication. An examination of the record, however, shows that prior to such publication persistent and diligent effort had been made to learn the whereabouts of the defendants, that personal service could not be obtained, and that from the best information that could be obtained, they were not residents of the State. In short, there appears to have been no failure in any respect, in the matter of notice.

Counsel for defendant contends that the notice was insufficient in that it—

does not allege any default for the first four years after making said entry; and that the entryman being deceased, and the present law permitting proof upon a four years' compliance with law, the said entry is not subject to contest.

The entry was made in 1884; the notice acknowledges that ten acres were broken in 1884, but alleges that "nothing has been done since."

So it does allege default during three of the first four years after making the entry. A strong effort was made at the hearing to show that the law was complied with during those four years. Whether such was the case or not need not be decided or discussed, inasmuch as it is acknowledged by the defendant's witnesses, that nothing has been done on the land from 1887 until the hearing, (February 20, 1892).

The contention that, if the defendant complied with the law during the first four years after entry, he can commute the same, although he (or they) did nothing for the next four years, and until the initiation of contest, but allowed the land to go back to sod, is without merit.

The proviso that any person "who has for a period of four years in good faith complied with the provisions of said timber culture laws," shall be entitled to make one final proof thereto, and acquire title to the same by the payment of \$1.25 per acre for such tract, (Sec. 1, act of March 3, 1891, 26 Stat., 1095), clearly refers to a person whose compliance extends to the time of application to commute, and not to a person who may at some time in the far past have complied with the law for a season, but who has failed to do so for years prior to the time of such application.

Commutation of a timber culture entry was undoubtedly intended by Congress to be substantially similar in principle and procedure to that of a homestead entry; and a homestead entryman is not allowed to commute unless he can prove compliance with the homestead law until the time of commutation.

The numerous other allegations of error are simply different forms of those already herein considered.

I concur in the conclusion reached by your office, and hereby affirm its decision holding the entry in question for cancellation.

PRIVATE CASH ENTRY—RAILROAD GRANT—WITHDRAWAL.

FLORIDA RY. AND NAVIGATION CO. *v.* HAWLEY.

A tract of land withdrawn for indemnity purposes under a railroad grant, and included in a descriptive list of lands announced for public sale under a subsequent proclamation of the President, that excepts therefrom all lands "reserved for railroad purposes" can not be regarded as "offered"; and a private cash entry of a tract occupying such status is void, and not subject to equitable confirmation.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 21, 1894. (E. F. B.)

This is a motion for review of the decision of the Department of May 20, 1889 (unreported), allowing the private cash entry of Chauncey I. Hawley, made April 27, 1882, for lot 3, Sec. 5, lots 1 and 2 Sec. 9, lot 1 Sec. 21, and lot 1 Sec. 29, T. 28 S., R. 24 E., Gainesville, Florida,

to be submitted to the board of equitable adjudication, alleging the following grounds of error:

1. In that, as matter of fact and law, it was error to find that all the land embraced in said entry was offered at public sale on April 18, 1879, and not having been sold, became subject to private cash entry, and so remained until the odd sections were withdrawn for indemnity purposes.

2. In that, it was error in law to hold that the entry "would have been void as to the odd numbered sections contained therein had the company perfected its claim by selection of said tracts as indemnity."

3. In holding that the entry should be referred to the board of equitable adjudication.

This case came before the Department originally upon the appeal of Hawley from the decision of your office holding for cancellation said cash entry as to the tracts above specified, upon the ground that said entry was made subsequent to the withdrawal of said land for the benefit of the Florida Railway and Navigation Company, and was therefore improperly allowed.

In considering this appeal the Department, by its decision of May 20, 1889, held that:

Hawley not having made his entry until after the land had been withdrawn, the same should not have been allowed and was therefore invalid, and would have been void as to the odd-numbered sections contained therein had the company perfected its claim by selection of said tracts as indemnity. Said withdrawal having been revoked August 15, 1887, the company has now no claim to this land such as should prevent its disposal to other applicants.

In view of the facts of the case, it was held that the entry might properly be submitted to the board of equitable adjudication.

Since this motion has been filed, Flemon R. Green has asked to intervene, alleging that he bought the tract from the railroad company in 1886, being advised by the local officers that the cash entry of Hawley was void, and that he has lived on the place, with his family, since May, 1886, making it his home and improving it to the extent of several thousand dollars.

When the decision now under review was rendered, attention was not called to the fact that the land embraced in said cash entry was excepted from among the lands to be offered under the proclamation of the President of December 24, 1878. It was stated in said decision that no restoration to private cash entry was made, and the lands have never been re-offered. The lands were therefore treated as having been once offered, but had not been restored after the revocation of the withdrawal for the benefit of the railroad company. Considering that the restoration notice was alone wanting, it was held that the entry "properly comes under the rules in *Pecard v. Camens* (4 L. D., 152,) as voidable, but not void, and may properly be submitted to the board of equitable adjudication."

This tract is within the indemnity limits of the grant made to the State of Florida by the act of Congress of May 17, 1856 (11 Stat. 15), to aid in the construction of a railroad from Amelia Island to Tampa

Bay and Cedar Keys, the benefit of which was conferred upon the Florida Railway Company whose rights and interests thereunder have been assigned and transferred through its successors to the Florida Railway and Navigation Company, the present beneficiaries of said grant. It was embraced in the order of withdrawal of indemnity lands, made March 26, 1881, which continued in force until April 15, 1887, when it was revoked and the lands restored to settlement under the general land laws, except such as may have been covered by approved selections. But it was held by Secretary Teller in his decision of January 30, 1884 (2 L. D., 561), that the order of March 26, 1881, merely continued in effect the previous withdrawal, and that the withdrawal of these lands, made in 1856 and re-affirmed in 1857, was existing at the date of the withdrawal of March 26, 1881. This was the effect of the ruling of Secretary Schurz, in his decision of January 28, 1881, authorizing and directing the said withdrawal of March 26, 1881, and the principle was re-affirmed by Secretary Lamar in his decision of August 30, 1886 (5 L. D., 107), concurring in the views of Secretaries Schurz and Teller, that the rights of the road were protected by the original map of definite location, filed in 1860.

It may be considered well settled by the decisions above referred to, that the order of 1856, withdrawing lands within the indemnity limits of this road, was in force at the date of the order of March 26, 1881, and that such withdrawal continued in force until August 15, 1887, when it was revoked.

On December 24, 1878, the President issued a proclamation, in pursuance of the act of Congress of June 22, 1876 (19 Stat. 73), declaring that a public sale of lands in certain townships, therein specified, which included township 28 S., range 24 E., would be held at the land office at Gainesville, Florida, on April 15, 1879, but in said proclamation it was expressly declared that "lands appropriated by law for the use of schools, military, or other purposes, or reserved for railroad purposes, will be excluded from the sale."

The tract in controversy being in reservation for railroad purposes at the date of said sale, was expressly excluded from the lands to be offered under the proclamation of the President, and by reason of this exception the attempted offering of said tract was without authority, and did not authorize the private cash entry of Hawley, which was allowed by the local officers, April 27, 1882, in disregard of said withdrawal.

From the foregoing statement it will be seen that the status of the land involved in this controversy was identically the same as that in the case of Florida Railway and Navigation Company v. Boardman (7 L. D., 56), in which it was held that the withdrawal for the benefit of the railroad company was subsisting in full force at the date of said offering, and that neither the act of June 22, 1876 (which did not become a law until July 4), nor the proclamation of the President in any way

authorized the land officers to make the attempted sale to Boardman in disregard of said withdrawal, that the proclamation of the President expressly reserved from among the lands to be offered "lands reserved for railroad purposes," and this exception prevented the attempted offering of the tract afterwards sold to Boardman. His entry was therefore canceled.

In a large number of cases, involving private cash entries of lands within the indemnity limits of this grant, and within the townships embraced in the President's proclamation, the entries were canceled upon the rule announced in the case of the Florida Railway and Navigation Company *v.* Boardman, *supra*.

Upon a re-examination of the case now under consideration, I am satisfied that the cash entry of Hawley was not merely voidable, but absolutely void, and, hence, is not of the class of cases that may be submitted to the board of equitable adjudication under the rule announced in the case of Pecard *v.* Camens, *supra*.

It is true that Rule 11 of the rules and regulations governing the submission of cases to the board of equitable adjudication, provides for—

All private sales of tracts which have not been previously offered at public sale but where the entry appears to have been permitted by land officers under the impression that the land was liable to private entry, and there is no reason to presume fraud, or to believe that the purchase was made otherwise than in good faith.

But this rule, which was promulgated in 1846, is in direct conflict with the decision of the Supreme Court in the case of Eldred *v.* Sexton, 19 Wal., 189, rendered at the October term, 1873, in which it was held that an offering of lands at public auction is made a condition precedent to the right of private entry, and until this condition has been performed, there is no power or authority in the land officers to dispose of lands at private entry, and such a sale is void.

In the case of Pecard *v.* Camens et al., *supra*, the Department held that, where lands had been once offered, then increased in price and again offered, and while in that condition declared by Congress to be subject to sale at the first price, a private cash entry allowed therefor without further offering is not void, but merely voidable for want of restoration notice, and such entries may be sent to the board of equitable adjudication for confirmation.

The case of Eldred *v.* Sexton, *supra*, was distinguished in this: that the lands of which Eldred made entry, although they had once been offered at the enhanced price of two dollars and fifty cents per acre, had never been offered at the minimum price, to which it was subsequently reduced, and at which price the cash entry was allowed, the ruling of the court being based principally upon the ground that the lands had never been practically offered, which was a condition precedent to the right of entry.

The case of Wakefield *v.* Cutter (6 L. D., 451), involved the question as to the validity of private cash entries made of odd sections within

the common limits of the Marquette and State Line, and Ontonagon and State Line railroad grants, and whether said entries could be submitted to the board of equitable adjudication under the rule announced in the case of *Pecard v. Camens*.

The even sections within the limits of this grant were the lands involved in the case of *Pecard v. Camens*. Both the odd and even sections had been offered at public sale in 1853, and the lands remaining unsold were thereafter subject to private cash entry at one dollar and twenty-five cents per acre. In 1856 the odd sections were withdrawn from market, and were subsequently certified to the State for the benefit of the railroad company, and the even sections were then offered at public sale at the enhanced price of two dollars and fifty cents per acre, and all of such sections remaining unsold were thereafter subject to private cash entry at the enhanced price.

On July 5, 1862, a joint resolution was passed by Congress, authorizing a change of route of said road, providing that upon a relinquishment by the State of all title and claim to the certified lands that it would be entitled to equivalent land along the new line of road, and said resolution then provided for the disposal of such lands as may be surrendered by the State as follows: "And it shall be the duty of the Commissioner of the General Land Office to re-offer for public sale in the usual manner the lands embraced in the surrendered lands aforesaid, when duly filed in his office as herein directed." The resolution also provided that the even numbered sections should thereafter be subject to sale at one dollar and twenty-five cents per acre.

The State relinquished to the government the odd sections, pursuant to said joint resolution, and upon these facts it was held that when the lands were certified back by the State, the government took them free from the condition that had attached to them prior to the certification to the State, and hence, they were lands that had never been offered at public sale under the present title of the government; that as the lands had not been offered in pursuance of the joint resolution of July 5, 1862, they were not subject to private cash entry, and entries allowed therefor were void, and could not be confirmed by the board of equitable adjudication, distinguishing the case of *Pecard v. Camens*.

A ruling to the same effect was made by the Department in the case of *Julius A. Barnes*, 6 L. D., 522, to wit: that a withdrawal of public lands in aid of a railroad grant abrogates the original offering, and on the revocation of such withdrawal they are restored to the public domain, free from their previous offered condition, and hence were not subject to private cash entry. In both of the cases last cited the Department refused to submit the entries to the board of equitable adjudication, for the reason that the entries were void because the tracts had not been offered according to law.

There being no authority to offer the tract in controversy, it must be considered as having never been offered, and, under the rulings of the

court and of the Department in the cases above cited, the private cash entry of Hawley was without authority and void and can not be confirmed by the board of equitable adjudication.

It further appears that the company applied to select this tract prior to the revocation of the withdrawal, and that its application was refused because of the entry of Hawley. The company appealed from the action of the local officers, rejecting said list, but it was afterwards discovered that the local officers had neglected to place the selections of record, and your office was asked to correct that error, which was refused; but the Department, on August 15, 1887, in revoking the withdrawal of indemnity lands for this road, directed that:

If any lists of selection have been presented by the company with tender of fees, which have been rejected and not placed on file and noted on the records of the local office, you will, if said lists are in your office or the local office, cause said selections to be noted on the record immediately; and if such lists are not in your office or the local office, you will advise the attorney of the company that they will be allowed to file in the local office said list of selections, and the same will be noted on the records as of the date when first presented: Provided the same be presented before the lands are opened to filings and entries.

This was the condition of the claim of the company to the land in controversy on November 23, 1887, when your office held for cancellation the private cash entry of Hawley, for the reason that it was made subsequent to the withdrawal, and was therefore improperly allowed.

Even conceding that this entry was merely voidable, I am of the opinion that the right of the company, under its selections made prior to the revocation of the withdrawal, was such an adverse claim as would prevent the confirmation of the entry by the board of equitable adjudication.

The decision of the Department of May 20, 1889, is therefore revoked, and the entry of Hawley will be canceled.

HOMESTEAD CONTEST—ABANDONMENT—RESIDENCE.

THOMASON *v.* PATTERSON.

The execution of a lease by a homesteader of the land embraced within his entry and the occupancy of said land by his tenant will not defeat the right of the entryman to perfect title under his entry, if he continues to reside on the land, and improve the same.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 21, 1894. (G. C. R.)

On October 27, 1885, Robert Patterson made homestead entry for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 20, T. 21 N., R. 43 E., Spokane Falls, Washington.

On October 21, 1890, Jasper Thomason filed his affidavit of contest against the entry, alleging, as in printed form (4-072), that the entry-

man "has wholly abandoned said tract and changed his residence therefrom for more than six months since making said entry and next prior to the date herein," etc. This affidavit was corroborated by Mark Mitchell, hereinafter referred to; also by one Thomas H. Mitchell.

Notice was issued, contestant made oath that he served the same on claimant October 27, 1890 (just five years after entry).

Hearing was had, and the register and receiver decided that the charge of abandonment, etc., was not sustained by the testimony, and that the entry should remain intact.

On appeal, your office, by decision dated May 23, 1892, reversed that judgment, holding that the charge of abandonment was proved, and that the entry should be canceled.

An appeal from that decision brings the case to the Department.

The record discloses the following facts:

At the date of the hearing, November, 1890, claimant was sixty-three years of age and a widower. He moved a house, twelve by sixteen feet, onto the land in the spring of 1886, made it comfortable for all seasons, and established his residence therein; he also put up eighty rods of wire fence, and thus enclosed the land in a field by joining fences with his neighbors. He increased the acreage of cultivated land each year, until 1889, when he had sixty-five acres of the tract in a fine state of cultivation; he also repaired and built more wire fencing. The land was very productive; each year up to 1889 he raised from four hundred to six hundred bushels of oats, and from two hundred to four hundred bushels of potatoes, and in 1888 eight hundred bushels of wheat. He also raised hay and fed his stock on the land (about sixty head of cattle and horses). He also appears to have owned about five hundred acres of land which joined the land in question. For the greater part of the time one of his two married sons lived with him on the land, and, with other hired help, assisted him in cultivating the same, together with the other adjoining lands. For two or three years prior to the contest, he was also engaged in buying and selling wheat for a part of the seasons, using a ware-house in Plaza for its storage, being about two miles from the land in controversy. This business, together with other business affairs in which he was engaged, frequently kept him away from the land for days and sometimes weeks, but he always returned to the land, which he called his home. He appears also to have frequently visited his married son and daughter, in Plaza, and generally took his meals there when buying wheat, staying there about one-half the nights. He was doubtless absent from the land a great many times and for considerable periods. Contestant's witness, Thomas Gilson, thinks he did not spend more than six weeks on the land since December, 1888. But, on cross-examination, it was developed that this witness' means of knowledge, concerning claimant's presence on the land, were limited, and he was doubtless biased from sympathy with the contestant.

B. A. Thomason, a brother of contestant, testified that he had worked on claimant's ranch since 1888, and that claimant had not lived on the land since he knew it "to exceed three weeks." It also appeared on cross-examination that this witness' testimony, as to the character of the residence, was given from very meager information.

The contestant, Jasper Thomason, a brother-in-law of Mark Mitchell, testified that he was employed by the latter to work on the ranch (including the land in controversy); that he moved on to the ranch, with Mitchell, October 6, 1889. He testified that Patterson was on the land "not to exceed three weeks," in February, 1889; that at no other time has he resided there, except "it would be a night or may be a day or such a matter; may be he staid all night, but made no improvements." He further says: "Patterson could not have lived there to exceed four or five days, without my knowing it." He also testified that no furniture has been in the house, "except an old stove, pretty well broken up, and a bottle of mustard; I also noticed a straw bed-tick and an old rough board table, not dressed, a bedstead and no other articles of furniture."

On cross-examination, it was shown that contestant who had thus testified had been away from the land at different times—at one time twenty-two days, and another four weeks. His means of knowledge were also limited, and his testimony falls far short of proving abandonment.

Claimant admitted his frequent absences from the place while attending to business; but it is shown that he had no other home; that his stock was kept on the place. He had no family of his own, and having for a part of the five years no one to live in the house during his necessary absences in attending to business, it was frequently and necessarily left unoccupied; he invariably returned to it, however, and substantially maintained a constructive, if not an actual, residence on the land.

It is insisted, however, that claimant leased the land, prior to the expiration of the five years, and thus rendered his compliance with the law impossible by his own act. This view is held by your office, and is the principal grounds upon which the judgment appealed from was rendered. This lease was introduced in evidence as "Exhibit A," and reads as follows:

This agreement, made and entered into this the 8th day of February, 1889, between Rob't Patterson, of Spokane County, W. T., of the first part, and Mark Mitchell, of the second part: *Witnesseth*, That the said party of the first part has leased, and does hereby let unto the second part (Mark Mitchell) his farm, situated and being in Town 21, Range 43, in Spokane Co., W. T., for the term of four years from the date above written, upon the following terms, to wit: said Patterson agrees to maintain and keep up good and sufficient fences to protect the crop, to repair the buildings, to give free of rent sufficient garden and vegetable ground for the ranch, also hog pasture of 1½ acres, the orchard and ground for the cultivation and care of the same; also, hay ground free of rent to hay for ranch-use, not to exceed forty tons; that the said Mark Mitchell is to put in grain, this, the present, year 210 acres, and after the

present year to have and put in all of the broke land on the entire ranch of 560 acres, with the exception of the above reservations. Said Patterson is to give up full possession of the buildings by the 1st of May next; said Mitchell is to do all work in as good season and in a good farmer-like manner, to sow good clean seed, well blue stoned, harvest in good time and deliver unto the party of the first part one-third of all the grain so raised and threshed on said ranch, to be delivered to said Rob't Patterson at the machine in his sacks.

ROB'T PATTERSON,
MARK MITCHELL.

GEORGE WHALEY,
Witness.

The evidence is silent as to how many buildings were on the 500 acre ranch. The lease which is dated February 8, 1889, provides for giving up "full possession of the buildings by the first of May next (1889)." The lease, however, in its very terms contemplates claimant's presence on the land, either by himself or employes, for while it gives possession of the whole ranch for four years, it also provides that claimant should "maintain and keep up a good and sufficient fence to protect the crop and to repair the buildings," and so, after the lease was executed and possession thereunder surrendered, and in the same year (1889), he built a new and a better house, twelve by twenty feet, with two rooms, rustic outside, dressed lumber, two windows, a door—being comfortable and neat. He moved out of the old house into this new one, and one of his sons and family moved in with him and lived there until harvest. This son then moved out, and another married son, with family, moved in and staid until October, 1889, when he moved out, leaving the claimant there. A grandchild was born there in September of that year. In 1890, the year of the contest, he built one hundred and sixty rods of wire fence on the place. He was served by contestant with the notice at his house on the land at daylight on October 27, 1889. He had then completed his full five years residence.

In the decision appealed from it is said:

While it may be true that he lived a number of years on the land in good faith, and might have made final proof before the initiation of contest proceedings, he did not do so, and must be held to a strict compliance with the requirements of law in the matter of residence up to the time he does make such proof.

This is an incorrect interpretation of the homestead law. Residence upon a homestead is not required after the expiration of five years as a prerequisite to patent; nor does a change of residence after that period forfeit a right already acquired. (*Lawrence v. Phillips*, 6 L. D., 140.)

It is true that residence must be actual during the required five years, and can not be maintained by a tenant; but it no where appears that claimant debarred himself from residence on the land. He was advised by the ex-register, Mr. Adams, that he must still reside on the homestead, if he leased the land. He appears to have done so, and, after the lease was executed, he still further improved the land by building a house and making fence.

I think the register and receiver were right in their decision. It follows that the decision appealed from is wrong. The same is accordingly reversed, and the contest is dismissed. Claimant will be advised that he can now submit his final proof, and, if satisfactory, patent will issue.

SCHOOL LANDS—INDEMNITY SELECTIONS—TRANSFEREE.

THE STATE OF OREGON.

A motion to dismiss an appeal will not be entertained on behalf of a stranger to the record, nor in the absence of due notice thereof to the appellant.

The withdrawal of a list of school indemnity selections terminates the interest of the State in the lauds involved, and it thereafter has no interest therein that can be the subject of investigation by the Land Department, or considered on appeal in the presence of intervening adverse claims.

A purchaser of the State's interest in school indemnity lands prior to the approval and certification of such lands acquires no rights thereby; and if the State, in such case, waive its right to claim under its selections the purchaser has no standing to be heard before the Department.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 21, 1894. (W. M. W.)

On the 22d day of June, 1893, your office considered such facts as were before it in the matter wherein the State of Oregon on March 15, 1893, applied at the local land office at Roseburg, Oregon, to select as school indemnity lands comprised in sections 4, 5, 6, 7, 8, 17, 18, 19, and the N. $\frac{1}{2}$ of Sec. 30, T. 40 S., R. 5 E., W. M., amounting to 2335.79 acres, and list No. 4 of indemnity selections, forwarded by the local office to your office March 17, 1893, showing the selection of the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of Sec. 8, T. 40 S., R. 5 E., proposed to be taken as indemnity for 400 acres in Sec. 16, T. 6 S., R. 43 E., alleged to be mineral, and rejected the claims of the State to select said lands, and at the same time denied the petition of the governor of said State for a hearing in the matter, for which he applied May 22, 1893.

A copy of your office decision was mailed by the local officers to the governor of the State on July 3, 1893, and on August 29, 1893, the State filed in the local office its appeal, which was transmitted through your office to the Department.

It appears that at the time your office acted on the State's application to select the lands, it had before it an appeal from the action of the local officers respecting the State's application, taken on behalf of parties alleging that the State sold the lands proposed to be selected to them before the State itself had applied for the lands, which appeal you declined to consider, on the ground that the parties appealing had no claim which it was the province of your office to adjudicate.

The parties so claiming filed an appeal, from such action of your office, in the local office on the 30th day of August, 1893.

On the 3d day of November, 1893, Messrs. Gideon and Gideon, who sign their names as "Attorneys for Charles H. Addington, *et al.*", filed a motion "to dismiss the appeal of the State of Oregon and others" on the grounds:

First: That said appeal was not filed within sixty days after the date of service of notice of said decision appealed from, on resident counsel.

Second: For the reason that said State of Oregon and others failed to serve the defendants or their attorneys with a copy of the notice of appeal, specification of errors, and argument, as required by Rule 86 and 93 of the Rules of Practice.

This motion was served on Messrs. Perkins and Chandler, who represent as attorneys the purchasers from the State, but disclaim having any authority to represent the State. The motion to dismiss not having been served on the State, or any one representing it, could not, for this reason, be sustained as against the State; aside from this, it is by no means certain that the parties represented by Messrs. Gideon and Gideon occupy such a position in this controversy as to require the State to serve them with notice of its appeal; the State is asserting its right to the land in question under its proposed indemnity selection, irrespective of the claims of individual claimants under the land laws of the United States, on the grounds that said selections were illegally rejected; the persons represented by the attorneys filing said motion to dismiss were not in any manner made parties defendant, or otherwise parties to the proceeding, on the part of the State, which claims the right to select the lands irrespective of the claims of settlers on the land prior to the survey of it. The alleged settlers being thus strangers to the record, they do not occupy such a position as to be authorized to challenge the right of the State to take or maintain its appeal; the motion to dismiss the appeal of the State is, therefore, overruled, and the rights of the State will be considered on the merits.

It appears from the papers before me that on March 17, 1893, the local officers rejected the State's proposed selection amounting to 2335.79 acres, lying in T. 40 S., R. 5 E., for the reason that the selections are in conflict with applications, filed simultaneously with said list, to enter lands under the homestead and pre-emption laws; "both applications being presented on date of filing map of survey." The register and receiver also held that "all claimants for agricultural lands, who have settled upon the land prior to survey, have the preference right of entry over a selection list." They therefore

rejected the list only as to conflicts existing, and the State can file amended lists; one covering the lands that are clear, and one for the lands in conflict. The one covering the lands that are clear, can be approved as of the date of filing the rejected list, and the one for lands in conflict rejected, subject to right of appeal. Should this ruling be objectionable, the State has thirty days in which to appeal to the Commissioner of the General Land Office, from this rejection.

The State neither appealed nor adopted the suggestion of the register and receiver, respecting filing of other lists or applications, but on the 31st day of March, 1893, the governor—who is also State Land Commis-

sioner—addressed a letter to the local officers, in which he said: "I hereby ask for the cancellation of the indemnity school land selection, made by list No. 104, and for the withdrawal of the list embracing selections aggregating 2335.79 acres, filed in the Roseburg land office March 15, 1893." Upon receipt of this letter, the register canceled the selections in T. 40 S., R. 5 E., and notified the agricultural and timber land applicants for the land in question of the withdrawal and cancellation of said school selection; thereupon the homestead applications and pre-emption declaratory statements were entered and filed in the local office.

List No. 104, referred to in the governor's letter of March 31, 1893, embraced only four hundred acres of the lands in controversy. It was forwarded to your office, and shows the selection of the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of Sec. 8, T. 40 S., R. 5 E., proposed to be taken as indemnity for a like number of acres in Sec. 16, T. 6 S., R. 43 E., alleged to be mineral.

By letter dated April 1, 1893, the register and receiver reported the request of the governor for the cancellation of the selections in said list No. 104, to your office for "consideration and instructions."

By letter of April 14, 1893, your office instructed the register and receiver to call upon the governor for his reasons in full for his action in relinquishing the selection.

On May 24, 1893, the local officers forwarded to your office a letter addressed to them by the clerk of the State Land Department, dated May 22, 1893, in which he said:

I am directed by his excellency, Governor Pennoyer, to say in reply to the letter of the Hon. Commissioner . . . that his reason for asking for the cancellation of list No. 104, and withdrawal of another list of same date, making selections in T. 40 S., R. 5 E., was that he was informed that these selections would be unjust to settlers in said township. Later he received information that made it apparent that the interest of all parties required a hearing, and a petition was forwarded to the Department, under date of April 17, 1893, asking that the Hon. Commissioner of the General Land Office authorize such hearing. This letter is in response to the Hon. Commissioner's letter "K," of April 14, 1893.

The petition thus referred to, was forwarded to your office by the local officers April 22, 1893. Said petition is lengthy, and after reciting the allowance by the local officers of the filings on portions of the land involved, after the withdrawal of the selection lists by the State, and the notice thereof given by the local officers, it contains a preamble, saying, among other things, that

parties others than those that were allowed agricultural filings have come, made their complaints, and have represented to me that they were also agricultural settlers on the remaining portions of said lands covered by said lists. . . . I, therefore, on the 30th day of March, 1893, notified the register and receiver of said land office that I desired to withdraw said lists. That my application for the withdrawal of said lists was made for the purpose that the rights of the parties claiming to be settlers, and the rights of the State, in this matter may be settled.

He then asks for a hearing to be ordered in order to determine the rights of the parties, and

if it is found that the parties referred to as actual agricultural settlers, are such, the State will waive its rights to the lands thus settled upon, but that the State will insist to the right of selection of all land described in said lists not covered by actual agricultural settlers.

Your office passed upon the petition and found that there is nothing in the case, as presented, tending to show any wrong of which the State can consistently complain. An appeal by the State brings the case here for final determination.

It is not necessary to discuss and pass upon the numerous specifications of errors set forth in the State's appeal, for the reason that it is not shown to be a party in interest. By the action of the governor in withdrawing its lists of proposed selections, it ceased to have, or assert any claim to any of the lands involved, which could properly be the subject of an investigation by the Land Department.

The governor of Oregon, in his letter of March 31, 1893, addressed to the local officers at Roseburg, Oregon, said:

I hereby ask for the cancellation of the indemnity land selection, made by list No. 104, and for the withdrawal of the list embracing selections aggregating 2335.79 acres, filed in the Roseburg land office March 15, 1893.

This can only be construed as an absolute and unqualified withdrawal upon the part of the State of all its claims or rights it might be entitled to assert, to the lands in controversy, and the government has no such an interest in the indemnity school selections of the State as would warrant this Department in proceeding to adjudicate its rights in the face of the request for cancellation of one list, and the withdrawal of another, by the chief executive and Land Commissioner of said State.

It is true, that in his petition for a hearing, he says: "That my application for the withdrawal of said lists was made for the purpose that the rights of the parties claiming to be settlers, and the rights of the State in this matter may be settled." But this in no wise reinstates the lists withdrawn. The legal effect of his withdrawal of the lists was to take the State, as a party, out of the controversy over the lands covered by said lists.

The State having been so taken out, and inasmuch as it has not in any manner been made a party since that time, it must be held to stand on precisely the same footing as any other stranger to the record, and must be accorded the same rights—and no other—as other outside parties who have no interest.

In the case of *Bishop v. Porter* (3 L. D., 103, it was held that, "on appeal or review, only those rights which are put in issue by the contest, may be considered in the face of adverse rights." In that case, Bishop's rights were not in issue, and other rights to the lands had intervened. In the case at bar, the State's rights to the land are not

in issue, its applications to select having been withdrawn, and other rights have attached by reason of entries, filings, and applications to purchase, as shown by the record.

It is well settled that the right of appeal to the Department from your office cannot be exercised by one who is not a party in interest. *Ewing v. Rourke* (12 L. D., 538); *Cyr et al. v. Fogerty* (13 L. D., 673) and *McChesney, et al. v. Aberdeen, et al.* (16 L. D., 397).

The appeal of the State of Oregon must be, and hereby is, dismissed.

Respecting the appeal of the parties claiming through purchases from the State, alleged to have been made prior to the filing of the proposed selections, it is clear that such parties could acquire no right or interest in, or to, the land until the State should acquire its title by an approved and certified selection, and no such selection having been made of any of the lands in question, it follows that the alleged conveyances of the State, if any such were made by it, could not invest any such purchaser with any better or greater rights than the State itself had to the land. Nor would the settlement, or other claims of the State's grantees, prior to such selection, add any force or validity whatever to the claims of the State, or her grantees. *State of California v. Sevoy* (9 L. D., 139-141); *Tonner v. O'Neill* (on review) (15 L. D., 559).

The State having waived its right to claim anything under the selections, by absolutely withdrawing them before any right to the lands embraced therein had attached, it is clear that its embryo grantees acquired no rights. Their rights were entirely dependent upon the rights of the State, which must have existed before such rights could be transferred by it to another. The State's rights never attached, and its claim to assert any right under the applications to select was waived by the governor's withdrawal of the lists. The appeal of the State's alleged transferees is therefore dismissed.

TIMBER AND STONE ACT—CHARACTER OF LAND.

GIBSON v. SMITH.

The word "timber" as used in the act of June 3, 1878, refers to such trees as are valuable for commercial purposes, and does not include trees that are valuable only as cord wood.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 21, 1894. (E. M. R.)

This case involves the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 31, T. 14 N., R. 5 W., M. D. M., Marysville land district, California.

The record shows that on November 20, 1891, John Smith made application to purchase as timber land under the act of June 3, 1878, the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 31, T. 14, N., R. 5 W.

On December 14, 1891, Andrew A. Gibson made homestead entry for lots 2 and 3, and the SE. $\frac{1}{4}$ of the N.W. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 31, T. 14 N., R. 5 W.

February 5, 1892, John Smith submitted proof as required by law, in support of his application to purchase, and, on the same day, Andrew A. Gibson filed his corroborated affidavit in which, after setting forth his qualifications to make homestead entry, he alleged in substance that the land was not timber land but was properly subject to homestead entry.

The case came up for trial immediately, and, on March 10, 1892, the local officers rendered their decision wherein they held that Smith's application to purchase should be held subject to the final proof of Gibson.

On April 23, 1892, Gibson filed his appeal contending that the case should have been decided in his favor without reservations.

Your office decision of August 9, 1892, reversed the holding of the register and receiver, and held that the homestead entry of Gibson should be canceled as to the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section.

On September 24, 1892, the homestead claimant appealed to the Department.

The evidence shows that on the forty acres in issue, there are from seventy-five to one hundred cords of wood. Section one, of the act of June 3, 1878, providing for the sale and purchase of timber and stone lands, is as follows:

That surveyed public lands of the United States within the States of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands:

In the case of the *United States v. Budd* (144 U. S. Reports, page 154), Justice Brewer in delivering the opinion of the court says—in speaking of the case then at bar—

If it be suggested that this dense forest might be cleared off and then the land become suitable for cultivation, the reply is, that the statute does not contemplate what may be, but what is. Lands are not excluded by the scope of the act because in the future, by large expenditures of money and labor, they may be rendered suitable for cultivation. It is enough that at the time of the purchase they are not, in their then condition, fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present. Many rocky hill-slopes or stony fields in New England have been, by patient years of gathering up and removing the stones, made fair farming land; but surely no one before the commencement of these labors would have called them fit for cultivation. We do not mean that the mere existence of timber on land brings it within the scope of the act. The significant word in the statute is "chiefly." Trees growing on a tract may be so few in num-

ber or so small in size as to be easily cleared off, or not seriously to affect its present and general fitness for cultivation. So, on the other hand, where a tract is mainly covered with a dense forest, there may be small openings scattered through it susceptible of cultivation. The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation.

The question there determined by the court was that the land in its present condition was the determining factor as to whether it came within the act, and not what its condition would be, were the timber removed.

But the case there decided was one where the timber was dense, and the trees of large size.

The language used in the act is "valuable chiefly for timber" not valuable chiefly for "wood." The act intended to cover those lands upon which the timber growing, at the time of the sale, was so dense and of such character as to make the timber valuable in the way of lumber and for commercial purposes. The facts in this case show that the trees growing upon the tract were valuable chiefly as wood to be used as fuel and not as beams or lumber, for the use of commerce.

It is therefore held that in the act of June 3, 1878, providing for the sale of timber and stone lands in certain States, the word "timber" therein used, referred to such trees as were valuable for commercial purposes, and did not extend to trees that were valuable only as cord wood.

It thus follows that the decision appealed from was in error, and the same is hereby reversed, and the homestead entry of Andrew A. Gibson will be allowed to remain intact.

HOMESTEAD ENTRY—ALIENATION.

SMITH v. KERR.

A deed of land embraced in a homestead entry executed prior to final proof by the entryman, in anticipation of death and for the purpose of securing the land to his children, will not be treated as an alienation that will defeat the right of the homesteader.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 21, 1894. (C. W. P.)

The attorney for William A. Smith has filed a motion for rehearing of the departmental decision, dated August 17, 1893 (unreported) in the case of said Smith against Thomas Kerr, involving Kerr's homestead entry for the NE. $\frac{1}{2}$ of Sec. 4, T. 24 S., R. 28 E., Visalia land district, California.

The newly discovered evidence consists in a deed from Kerr to the Reverend James Vereker, by which the land in dispute is conveyed to said Vereker absolutely, and the record of the final proof of the said Kerr.

The affidavit of contest alleges that Kerr had abandoned the land and changed his residence therefrom for more than six months immediately prior to the date of contest, and that he had not complied with the law in settling upon and cultivating the same.

Kerr has filed counter-affidavits, by which it appears that the deed to Father Vereker was intended as a deed of trust for the children of Kerr, in case of his death, and was intended to take effect only after his death.

Kerr was an inmate of the city and county hospital at San Francisco, California, at the time of the execution of the deed, the 23d of September, 1890, and was very ill, too ill to write his name. He swears that the deed "was not a conveyance in the nature of a sale or mortgage, but in the nature of a will." He is corroborated by Father Vereker, who swears that the property was conveyed to him "in trust for the children of the said Thomas Kerr, and for no other purpose whatsoever, and said deed being made in anticipation of death of said Thomas Kerr." It also appears by Kerr's affidavit that the land has been reconveyed to him by Father Vereker.

I am therefore of opinion that the conveyance of the claim to Vereker was not a sale, or alienation of the land, within the meaning of the homestead law, and consequently is not proof of abandonment. The entry could not be successfully contested on the ground that the deed was an alienation of the land prior to final proof, the counter-affidavits showing clearly that the conveyance of the claim to Vereker was only an apparent violation of the law, with no intention to sell or alienate the claim, and I am of opinion that Kerr's conduct showed no want of good faith, and if a violation of the latter, was not a violation of the spirit of the law.

For the reasons above given the motion is denied.

DAVID SAMPSON.

Motion for review of departmental decision of May 1, 1893, 16 L. D., 407, denied by Secretary Smith, March 21, 1894.

FLORIDA RY. AND NAVIGATION CO. v. DELBRIDGE.

Motion for review of departmental decision of April 13, 1889, 8 L. D., 410, sustained by Secretary Smith March 21, 1894, on authority of the ruling in the case of said company against Chauncey I. Hawley, 18 L. D., 236.

PRACTICE—EVIDENCE—DECISIONS OF LOCAL OFFICERS.

HUNT v. GARLAND.

In all cases where the testimony submitted is not taken in the presence of the local officers that fact should be distinctly shown by the record, as the value of their finding of facts is largely dependent upon their opportunity to observe the appearance and demeanor of the witnesses.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 21, 1894. (P. J. C.)

The land involved in this controversy is the SW. $\frac{1}{4}$ of Sec. 2, T. 15 N., R. 3 W., Guthrie, Oklahoma, land district.

The record in this case shows that Charles W. Garland filed soldier's declaratory statement for said tract April 25, 1889, and on June 20 following made homestead entry. Meantime, and on May 13, Charles B. Hunt also made homestead entry of said tract.

On July 16, following Hunt filed an affidavit of contest, which, together with an amended affidavit filed on the day of the hearing, alleges his prior settlement.

Your office, by letter of January 21, 1890, held Hunt's entry for cancellation, because of conflict with Garland's entry made under his previous filing. Hunt protested against this; Garland also protested against any modification of your said office order. Subsequently, however, all further action was suspended until the contest was disposed of.

A hearing, purporting to have been held before the local officers, was had September 18, 1890, at which time the parties appeared. The findings of fact of the local officers is, in full, as follows—

We find from the evidence in this case that contestant Charles B. Hunt arrived at Seward, O. T., on the first passenger train going south, at about 2:40 o'clock P. M., April 22, 1889. That he left the train while it was yet in motion and running at a rate of from twelve to eighteen miles per hour at near the north end of the switch track at said station of Seward and within a few yards of the south line of the tract of land in controversy. That he ran immediately upon said land and initiated a settlement by sticking in the ground a small representation of the American flag, which act was closely followed by others of a similar character calculated to give notice of the selection of the same as a homestead and that said acts were followed by actual and continuous occupancy and residence and improvement and cultivation sufficient to constitute a valid settlement under the homestead laws. We also find that the inceptive act of selection and settlement so made by him was prior in point of time to that of any other person now claiming said land as a homestead.

They therefore recommended the cancellation of Garland's entry, and that Hunt's remain intact. Garland appealed, and your office, by letter of April 2, 1892, affirmed their judgment. In doing so your office decision quoted the above language from the judgment of the local officers, and then, in a few words, without discussing the testimony at all, save to very briefly state a conclusion therefrom, approved their findings, evidently for the reason, as stated, that—

The record is burdened with much that is irrelevant and immaterial, and it is difficult to determine in whose favor the preponderance of evidence rests.

In such cases it is the established rule to sustain the decision of the local officers, who had the advantage of judging the personality of the several witnesses who testified before them.

A motion for review of this decision was filed, and on August 9, 1892, your office overruled the same, without adverting to the facts at all. The following language was used in passing upon this motion:

In cases where the evidence is conflicting and so evenly balanced as to make it difficult to render an equitable decision based on the mere reading of the evidence, it is the practice of this office to give great weight to the joint decisions of the local officers before whom the testimony was taken, and who had the opportunity to observe the manner and bearing of the witnesses when giving their testimony. This practice was followed in the case under consideration, and decision rendered, affirming yours, and I find nothing in said ruling which warrants the sixth specification of error.

Garland again appealed, assigning numerous errors, all of which, however, are addressed to the findings of fact, except the first, by which it is alleged that it was error to give undue weight to the decision of the local officers, by reason of the fact that the testimony was not taken before them, as it purports to have been.

Subsequent to the filing of the appeal, Garland presented a motion, supported by his affidavit, to require the local officers to certify to the Department whether or not they or either of them were present while the witnesses were being examined, and whether or not the register read the testimony at all after it was reduced to writing.

In his affidavit it is shown that by agreement of the parties the evidence was taken in a room apart from the land office, by a typewriter, the witnesses having been sworn before the register and receiver. The record does not contain this stipulation, nor is there anything in it that would indicate such a course of proceedings. The stipulation, however, is not denied by counsel for Hunt.

The motion is refused for the reason that it appears that the testimony was thus taken by stipulation; hence the defendant cannot now be heard to complain. But I think the practice of allowing the testimony to come up here purporting to have been taken before the local officers, when, as a matter of fact, it was not, is a reprehensible one, and should not be tolerated. When a record comes up from the local office, and the testimony purports to have been taken before the register and receiver, their findings of fact have always been accepted and

adopted unless clearly wrong. This doctrine is so well settled that it needs no citation of authorities to support it, and in your said office decision and on the motion for review, quoted above, the reason for the rule is clearly expressed. The force of this reasoning is broken, however, where it is ascertained that the local officers did not have the opportunity of observing the demeanor of the witnesses when upon the stand, and under such circumstances their judgment is not entitled to the weight it would have if the evidence had been taken in their presence. Furthermore, I think, in fairness to the litigants, and the Department as well, the record in every case where the testimony is not taken before the local officers, that fact should be distinctly shown. The presumption is, naturally, that where there is no showing to the contrary, the testimony was taken before the register and receiver, and proper weight is given, under the rulings of the Department, to their findings of fact and recommendations. But it will readily be conceded that if they are not present at the taking of the testimony, your office or the Department could not place that reliance on their judgment that it would otherwise be entitled to.

* * * * *

KITCH v. GRIFFIN ET AL.

Motion for review of departmental decision of August 17, 1893, 17 L. D., 180, denied by Secretary Smith, March 21, 1894.

RAILROAD GRANT—ADJUSTMENT—MOIETY.

NORTHERN PACIFIC R. R. Co.

In the adjustment of railroad grants questions of moiety do not arise except in the case of grants made by the same act for different lines of road that overlap. The decision in the case of the Northern Pacific R. R. Co., 17 L. D., 448, cited and construed.

Secretary Smith to the Commissioner of the General Land Office, March
J. I. H. 21, 1894. F. W. C.

I am in receipt of your letter of December 16, 1893, in the matter of the application of the forfeiture declared by the act of Congress approved September 29, 1890 (26 Stat., 496), to the grant for the Northern Pacific Railroad Company in the neighborhood of Portland, Oregon.

The original grant made by the act of Congress, approved July 2, 1864 (13 Stat., 365), provided for a branch line terminating at Portland, Oregon.

By the resolution of May 31, 1870 (16 Stat., 378), this grant was made to apply to the line provided for by the resolution of April 10,

1869 (16 Stat., 57), which provided for an extension of the branch line from Portland to Puget Sound. It is true that the resolution of May 31, 1870 (*supra*), changed the branch line to the main line, and provided for a continuous line to Puget Sound by way of Portland, but this Department has always held that there are two grants, and that the grant from Portland north was made by the resolution of May 31, 1870. See *Northern Pacific R. R. Co. v. McRae* (6 L. D., 700).

The line of the Northern Pacific R. R. Co. was constructed from Portland north, but was unconstructed eastward from Portland to Wallula, Washington.

The question as to the separation of the forfeited lands from the unforfeited, or those appertaining to the constructed portion of the road, was considered in departmental decision of December 24, 1890 (11 L. D., 625), and it was held that the terminal theretofore established at Portland upon the constructed road, properly separated the lands earned by construction from those forfeited.

In the matter of certain indemnity selections made by said company, of land within the indemnity limits opposite the constructed road north of Portland and also within the limits of the withdrawal on general route for the unconstructed portion of the road east of Portland, it was held in departmental decision of October 17, 1893 (17 L. D., 448), that:

That portion of the Northern Pacific Railroad along the Columbia River, to which these lands were granted, has never been constructed, while that portion from Portland to Puget Sound has been. Had the lands selected been within the granted limits of the last named road, *or branch*, the claim of the company, that they were opposite a constructed road, and hence not within the purview of the forfeiture act, could be urged with much greater force. Being, however, within the granted limits of a road which was not constructed, they were subject to the act of 1890, which forfeited such lands to the United States.

Granted lands are not subject to indemnity selection, by the company to which they are granted, or by any other company. So long, therefore, as these lands remained within the limits of the unforfeited grant to what was expected to be the main line of the Northern Pacific Railroad, they were not subject to selection as indemnity lands *by what was expected to be a branch line* of the same road. They remained within that grant until the passage of the forfeiture act of September 29, 1890, and that act expressly provided that no lands forfeited thereby should inure to the benefit of a corporation to which Congress had previously granted lands.

After quoting so much of said decision as is above given, your letter states:

It appears from this language that the line of the company's road between Portland and Tacoma was treated as a branch line, and if that is correct the action of this office in making the restoration of the lands forfeited by the act of September 29, 1890, was incorrect, as it did not restore the moiety within the overlap of the limits of this portion and the forfeited portion of the company's road, which was declared forfeited by the sixth section of said act.

But as this office is of opinion that the company's road between Portland and Tacoma, is not a branch line, nor has it been expected to be since the resolution of 1870, but is, and since then has been a part of the main line, it is thought proper before taking any steps looking to the restoration of said moiety, to ask instructions in the premises.

From what has been said, it will be seen that this Department has already considered the question as to the separation of the forfeited from the unforfeited lands at Portland, Oregon, in the matter of the grant for said Northern Pacific R. R. Company.

The expression "branch line" as used in the decision of October 17, 1893, was in the sense of an extension of the original grant, so as to distinguish the grants. Nothing was involved in that case that could in anywise affect the restoration of lands under the forfeiture act, and it was not intended to disturb any previous adjudication made in the matter of said restoration. I fail to find any warrant for your suggestion in the matter of a moiety of lands to be restored in the neighborhood of Portland.

Moieties are only applied to grants, made by the same act, for different lines of road, that overlap, but in this instance the grant for that portion of line to Portland is of a different date from that appertaining to the extension north of Portland, and no question of moiety can possibly apply.

In this connection I might add that there are cases pending before this Department for adjudication in which it is claimed that other lands were forfeited than those restored in Clarke Co., Washington, but action upon these cases has been suspended to await the decision of the supreme court in the case of the United States against the Northern Pacific Railroad Company, *et al.*, recently decided, but a copy of the decision has not yet been received.

Further instructions in the matter at this time are, however, unnecessary.

PRACTICE—REHEARING—NEWLY DISCOVERED EVIDENCE.

DOUGHTY *v.* DAWSON.

A rehearing will not be granted on the ground of newly discovered evidence, competent only to support a charge laid in the contest affidavit on which no evidence was offered at the hearing.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 21, 1894. (G. B. G.)

Under date of June 24, 1893, the Department rendered a decision (unreported) involving title to the SE. $\frac{1}{4}$ of Sec. 25, T. 18 N., R. 3 W., Guthrie land district, Oklahoma Territory.

Alice E. Dawson made homestead entry for the tract April 26, 1889. May 29, following, E. J. Doughty filed his affidavit of contest, alleging—

That the said Alice E. Dawson is not a qualified entryman under the act of Congress approved March 2, 1889; that she never made actual settlement on said land, and has made no improvements; that the affiant settled on said land on April 22, 1889, after the hour of 12 m; that such settlement was made in good faith, with a view to claiming said land as his homestead, and that his said settlement was made prior to the time defendant made her homestead entry for the land.

A hearing was had at the local office. The register and receiver found in favor of the entryman Alice E. Dawson. Contestant appealed, and your office concurred in the opinion of the local officers, and on further appeal to the Department, the judgment of your office was affirmed.

More than thirty days after notice of departmental decision rendered herein, the contestant filed his motion for a rehearing, based on the ground of newly discovered evidence.

The alleged newly discovered evidence is in support of the first charge in the contest affidavit, to wit: "That the said Alice E. Dawson is not a qualified entryman under the act of Congress approved March 2, 1889."

An examination of the record shows that the contestant offered no evidence at the hearing, tending to establish the aforesaid charge, and there is no rule of law that permits the granting of a new trial on newly discovered evidence competent only to support an issue on which no evidence was offered in the court below.

A new trial will not be granted on the ground of newly discovered evidence . . . if it applies to a point directly drawn in question by the suit, but which was so far abandoned at the trial, and in the preparation for it, by the losing party, that all inquiry for evidence upon that point was waived by him. See Hilliard on New Trials, 492.

The question of the qualifications of the entryman may properly arise as an issue between the entryman and the government on the offering of final proof, but the Department will not permit a settler to be harassed with a new trial in the interest of a contestant, except in accordance with well defined principles of law applicable thereto.

Contestant's motion for a rehearing herein is therefore denied.

RAILROAD GRANT—SELECTION—ACT OF AUGUST 5, 1892.

ST. PAUL, MINNEAPOLIS, AND MANITOBA RY. CO.

The prior adverse right of a town settlement defeats a selection under the act of August 5, 1892, to the extent of the lands that may be entered by the town settlers under the land laws.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 21, 1894. (F. W. C.)

I am in receipt of your letter of March 5, 1894, forwarding for my approval clear list No. 1, of selection made by the St. Paul, Minneapolis and Manitoba Railway Company under the act of August 5, 1892 (27 Stat., 390), embracing one hundred and sixty acres of land situated in the Minot land district, North Dakota.

It appears that this township was surveyed in the field between August 28 and September 7, 1892; that the plat of survey was approved on December 8, 1892, and that the company selected the land as an

unsurveyed tract on December 20, 1892, before the approved plat had been filed in the local office.

The township plat shows that there is a town located partly upon this and adjoining lands, and the field notes state that the town contains about one hundred and fifty people.

Under the act of August 5, 1892 (*supra*), the lands subject to selection by the company are restricted to the non-mineral lands so classified at the time of the government survey, "not reserved, and to which no adverse right or claim shall have attached or been initiated at the time of the making of such selection."

It is apparent from what has been stated that prior to and at the time of the company's selection adverse rights existed in the occupants of this and the adjoining land, so far as embraced in the town settlement, to the extent of lands that might be entered by such occupants under the land laws.

The record shows *prima facie* a claim adverse to that of the company ante-dating its selection, and I am of the opinion that this list should not be approved until it has been shown that such occupants have no rights in the premises.

I must, therefore, refuse to approve the list as submitted without further showing on the part of the company as to the rights of these adverse occupants shown to be upon the land by the return of the surveyors.

The list is herewith returned for your further consideration in connection with any showing that may be offered by the company.

MINING CLAIM—TOWNSITE ENTRY.

DUFFY QUARTZ MINE.

A mining claim is not legally "known to exist" from the location thereof if the boundaries of the claim are not specifically marked on the ground and due notice of the location given.

A townsite patent can not be successfully attacked on the ground that it embraces land "known to be valuable for mineral," if such land was not covered under existing law by a valid mining claim or possession at the date of the town site entry, or then known to be valuable for the mineral contained therein.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 23, 1894. (J. I. P.)

February 13, 1873, cash entry No. 4961 for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 33, T. 3 N., R. 13 E., M. D. M., and other tracts, was made in the Stockton, California, land office, by W. B. Norman, judge of the county court of Calaveras county, as trustee for the inhabitants of Altaville, and patent was issued thereon April 20, 1875.

July 10, 1891, W. Mercer and E. Purdy offered for filing their mineral application for the Duffy Quartz mine, situate in the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 33. Said application, because of conflict with said townsite patent, was rejected by the local office, and the papers forwarded to your office, which, by letter of August 8, 1891, ordered a hearing, to determine "whether or not, at the date of the townsite entry, the ground covered by said Duffy Quartz mine—survey No. 3040—was known to be valuable for mineral," with a view of instituting suit to vacate the townsite patent to the extent of the alleged conflict; should the question submitted, be decided in the affirmative.

On the hearing had October 15, 1891, the local office found that the ground in question was known to be valuable for mineral since 1866.

A rehearing was ordered by your office and held September 6, 1892, on the ground that the owners of lots 5, 7, and 38, block No. 1, of said townsite had not been notified of the hearing. Notice of the hearing was properly given, the owner of lot 5 made default, but the owner of lots 7 and 38 appeared and cross-examined the witnesses of the mineral claimants. On the evidence adduced, the local office, on September 14, 1892, found as before.

Thomas G. Peachy, the owner of lots 7 and 38, appealed from said decision to your office, which refused to entertain the appeal for the reason that this was not a controversy between parties but a hearing ordered by the government for its own information, and that the report of the local office was not an action from which an appeal would lie. Peachy took no action with reference to the refusal of your office to entertain his appeal, and by letter "N" of August 5, 1893, your office transmitted to this Department the record and papers in the case, with the opinion expressed, that the mineral claimants had made out such a *prima facie* case, as would warrant the recommendation of suit to set aside the patent for the townsite of Altaville, so far as it conflicted with said Duffy Quartz mine, mineral survey No. 3040, and your office so recommended.

Survey No. 3040 was made February 9, and 10, 1891, and was approved by the surveyor-general of California May 26, 1891.

If the tract covered by the mineral survey No. 3040 was known to be valuable for gold, silver, cinnabar or copper, or to be covered by any valid mining claim or possession held under existing law, at the date of the townsite entry, no title thereto was obtained under the townsite patent. (Sec. 2392, Revised Statutes of the United States; *Deffeback v. Hawke*, 115 U. S., 392; *Pikes Peak Lode*, 10 L. D., 200; *Pacific Slope Lode*, 12 L. D., 686; *Cameron Lode*, 13 L. D., 369.)

The questions presented for consideration are—

1. Was the mineral claim known to exist, as alleged, prior to date of the townsite entry; and
2. Was it known to be valuable for minerals of gold, etc., at that time.

A vein or lode may be said to be known to exist, when its location has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, although personal knowledge of the fact may not be possessed by the applicant for a patent. (*Noyes v. Mantle*, 127 U. S., 348.)

Land may be said to be valuable for minerals, when minerals are found in sufficient quantities to justify expenditures in the effort to extract them. (*Deffeback v. Hawke*, *supra*.)

In this case the record shows that in 1866 Duffy went on the claim in question. It had several years before that time been occupied by two men named Brown and Crins, who, after working it for a while, abandoned it.

Duffy attempted to make a location of said claim by setting up two stakes, one at each end of the tract he was seeking to locate, and posting a notice on each stake that he claimed from one stake to the other, and to the width of 300 feet. He says that the stakes were placed in the center of the quartz vein, but there is nothing in the record showing that the notices so stated. That was all he did. He did not mark the boundaries of said claim or location, "specifically on the surface, so as to be readily traced," and no notice of said location "was recorded in the usual records." On August 7, 1885, he made what he terms re-location of said claim; notice of this alleged re-location was duly recorded August 10, 1885. This was nineteen years after the alleged location of said claim, and twelve years after the townsite entry. Duffy admits that he does not know as a matter of fact exactly how much land was included in his alleged location, as he did not measure it, and he does not know whether it was made in accordance with mining rules as they then existed or not, as he has forgotten what those rules were.

The record does not show that the townsite applicant had any knowledge of said vein or claim at the time of the townsite entry or prior to patent. On the contrary, he filed the required affidavit "that no known vein or lode existed within the limits of said townsite entry."

Besides Duffy, the witnesses who testify are Bert Underhill, Edward F. Purdy, father of one of the present owners of the mine, Moses G. Foster, who sold lots 7 and 38 to Peachy, and William Mercer, one of the present owners of the mine. These men are all miners and prospectors. Duffy's testimony, in addition to what is indicated above, is in substance that he worked said mine from 1866 to 1868; that he kept no account whatever of the amount of gold taken out during that time by him; that he took out \$9,000 or \$10,000, and adds, "I kept no run of it at all." In 1868 he sold, to a man by the name of Love, for \$150, this mine that had paid him \$9,000 or \$10,000 in two years. Love owned it until 1871 or 1872, during which time it appears to have been practically abandoned, as there is no competent evidence that Love

worked the mine at all. He sold it to Duffy for the same price he gave for it. Duffy says he did lots of work up to and including 1873; that "he kept no run at all" of the value of gold taken out during that time; then he says that he took \$1,400 out of one vein at one time, and \$3,000 out of another, and states in general terms that it paid well.

Underhill knew of the existence of the quartz vein claimed by Duffy before the date of the townsite entry. But he says he took some quartz out of that vein and worked an arrastre, and that it did not pay. That he did a good deal of surface mining on the ridge where this claim is located, and that after he worked the surface off, there was nothing there, and that he was always of the opinion that the gold on that ridge came from the top of it, and that was all he could make out of it.

Purdy knew that Duffy worked the mine before the townsite entry, and took gold out of it.

Foster was a miner and prospector and the owner of lots 7 and 38, alleged to be in conflict with the claim, and believed that Duffy's claim took in a portion of those lots, and told Peachy, the present owner, so when he sold him the lots. Foster knew that Duffy worked the claim before the date of the townsite entry, and that there was a quartz vein there. This is all the evidence offered as to the existence of the vein and the value of the output prior to the townsite entry.

Mercer is one of the present owners of the mine, and testified that the required amount of improvements had been put on the claim prior to application to enter.

It is further in evidence that when the survey of the townsite was being made, it was suggested to Duffy by Foster that he have his claim surveyed and segregated from the townsite, but he declined or neglected to do so.

It is further shown that the mining operations of Duffy, with the exceptions of a little prospecting at various times, have been carried on outside the limits of lots 7 and 38, both before and after the townsite entry and patent. He stood by while the townsite was making final proof, and interposed no protest to the issuance of a patent for the tract occupied by his alleged claim.

Will this state of facts warrant this Department in recommending a suit to set aside the townsite patent because of conflict with said alleged mining claim? I think not.

The existence of the quartz mine within the limits of the townsite is not disputed. But that said vein was "known to exist," within the contemplation of law, as laid down in the case of *Noyes v. Mantle*, *supra*, prior to the date of the townsite entry, the record absolutely fails to show. This would necessarily preclude a consideration of the second proposition. But admitting the first proposition to be answered in the affirmative, the second proposition, as defined in *Deffeback v. Hawke*, *supra*, is not so established.

The statements of Duffy as to the amount of gold taken out of said vein, prior to the date of the townsite entry, are of no value, for the reason that they are based on no reliable data, and are preceded and followed by the statement that "he kept no run of it at all," showing that he had no accurate recollection concerning the matter, and that said statements are mere assertions—absolute guess work. Besides, the price for which he sold said mine, and repurchased it, is in ridiculous disproportion to the value of its alleged output. In connection with these facts, the abandonment of the claim by the original locators, Brown and Crins, the statement of Underhill that the working of the quartz he took from this vein did not pay, and the practical abandonment of the claim by Love during the time he owned it, convinces me that it was not known to be valuable for its minerals, within the rule as defined in *Deffebach v. Hawke*, *supra*.

The alleged relocation of the claim on August 7, 1885, the reposting of notices, etc., and the recording thereof, from whatever motive done, cannot cause Duffy's so-called rights to antedate the townsite entry, but those rights, whatever they may be, date from that relocation. But this was long after the township patent. In the case of *Davis (Administrator) v. Weibold* (139 U. S., 526), the supreme court say—

In *Deffebach v. Hawke*, the mining patentee's rights antedated those of the occupants under the town-site law, and wherever such is the case his rights will be enforced against the pretensions of the town-site holder; but where the latter has acquired his rights in advance of the discovery of any mines and the initiation of proceedings for the acquisition of their title or possession, his rights will be deemed superior to those of the mining claimant.

For the reasons stated I think there was a failure to show that the ground covered by the Duffy Quartz mine, survey No. 3040, was known to be valuable for mineral at the date of the townsite entry, and I cannot concur in the recommendation of your office that suit be instituted to set aside the townsite patent, because of conflict with said alleged mineral claim.

You will inform the local office of the conclusion reached, and direct it to notify the parties in interest.

RIGHT OF WAY—RAILROADS—UNSURVEYED LANDS.

NORTHERN PACIFIC AND MONTANA R. R. CO.

The rule adopted in the circular of February 20, 1894, with respect to right of way maps for canals and ditches over unsurveyed lands held applicable to railroad right of way maps.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 23, 1894. (F. W. C.)

I am in receipt of your report of May 3, 1893, upon letter from W. K. Mendenhall, resident attorney for the Northern Pacific and Montana

R. R. Co., having in view the modification of the circular approved March 21, 1892, 14 L. D., 338, under the act of March 3, 1875 (18 Stat., 482), granting the right of way to railroads over the public lands.

By the circular, the practice theretofore prevailing of approving maps showing the location of railroads across unsurveyed lands, was discontinued.

As stated in said report "it seems to be admitted that by such filing and approval no rights were acquired by the railroad companies as the act of 1875 does not provide for the filing and approval of the same."

It would appear, however, that the company desires that some information shall be upon the records to apprise intending settlers and others of its claimed rights under said act across the public lands.

In the circular approved February 20, 1894, 18 L. D., 168, under the act of March 3, 1891 (26 Stat., 1095), governing the right of way granted for canals, ditches, and reservoirs across the public lands it is stated.

Canals, ditches, or reservoirs lying partly upon unsurveyed land can be approved if the application and accompanying maps and papers conform to these regulations but the approval will only relate to that portion traversing the surveyed lands.

Maps showing canals, ditches, or reservoirs wholly upon unsurveyed lands may be received and placed on file in the General Land Office and the local land office of the district in which the same occurs, for general information, and the date of filing will be noted thereon; but the same will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps will not dispense with the filing of maps after the survey of the lands and within the time limited in the act granting the right of way, which map, if in all respects regular when filed, will receive the Secretary's approval.

I can see no objection to a like rule being applied to railroads.

You will so advise Mr. Mendenhall and be governed accordingly.

CONTRACT FOR SURVEY—APPROPRIATION.

FORT THOMAS RESERVATION.

An unexpended balance of an appropriation, made specifically for the service of a particular fiscal year in the survey of abandoned military reservations, can not be used in payment of a liability under a contract awarded after the expiration of said year.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 23, 1894. (W. M. B.)

I am in receipt of your letter of November 21, 1893, transmitting contract and bond No. 33, dated November 6, 1893, entered into between the United States surveyor-general for the Territory of Arizona, and Lorenzo D. Chillson, United States deputy surveyor, for the completion of the survey of the Fort Thomas military reservation, Arizona, which said reservation was transferred and turned over to this Department by proclamation of the President, bearing date November 22, 1892,

whereby it was restored to the public domain, in conformity with an act of Congress approved July 5, 1884, relating to "abandoned and useless military reservations."

The act of March 3, 1893, (27 Stat., 592, 593), making regular annual appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes, including, *inter alia*, general and specific appropriations for the public surveys for said fiscal year is in words and figures as follows—

For surveys and resurveys of public lands, two hundred thousand dollars.

For necessary expenses of survey, appraisal, and sale, and pay of custodians, of abandoned military reservations transferred to the control of the Secretary of the Interior under the provisions of an act of Congress approved July fifth, eighteen hundred and eighty-four, including a custodian of the ruin of Casa Grande, five thousand dollars;

In your said letter, relative to surveys under said contract, you say—

I have, therefore, the honor to request that the proposed survey of the Fort Thomas military reservation in Arizona, be authorized; liability \$400, chargeable to the appropriation of \$5,000.

Your request is granted, and you are hereby authorized to approve contract No. 33, in accordance with the terms and provisions therein contained, for the survey of the lands designated in said contract, liability created thereby payable from said appropriation of \$5,000, above mentioned.

In this connection you submit an inquiry, which, being substantially formulated, is as follows—

Whether the unexpended balance of \$668 remaining from the appropriation of \$6,000 made specifically for the "necessary expenses of survey, appraisal, and sale, and pay of custodians of abandoned military reservations, . . . including a custodian of the ruin of Casa Grande," as provided in act of August 5, 1892 (27 Stat., 370), and contemplated and authorized by the act of July 5, 1884, can be used for payment of a liability under contract awarded after the expiration of that particular fiscal year.

In concluding your said letter you further state—

it is understood that these appropriations for the survey of military reservations, being for a specific purpose, do not lapse into Treasury in the same manner and period as do the annual appropriations for public surveys and resurveys.

The determination of those questions depend upon the condition as to whether said appropriations specifically made for the objects designated belong to the class known as "annual," "permanent annual," or "permanent specific," which fact must be ascertained from the intent of Congress making said appropriation, to be gathered from the words of the act, and from other sources, as far as possible.

It is plainly evident from an examination of the act approved July 5, 1884 (23 Stat., 103), that a service of a continuous nature is contemplated, the expenses incident to the completion of which must be

liquidated by funds arising from one of the three classes of appropriations known as annual, permanent annual, or permanent specific.

Since the passage and approval of the act of July 5, 1884, *supra*, a little more than nine fiscal years have elapsed and during that time nine acts making annual appropriations for "sundry civil expenses of the government" for as many designated fiscal years, have been passed by Congress and properly approved, and each one of said acts has contained a specific appropriation for the service therein designated, and as contemplated by said act of July 5, 1884.

These appropriations were embodied in those portions of said acts making provision for survey of the public lands, and were interjected between other paragraphs of annual appropriations for current expenses, for such service, and made specifically for the service of the designated fiscal years, and like the appropriations for the survey generally of the public lands, varied from time to time in amount, as occasion and the necessities of the service might seem to require.

The extent and duration of the service which might arise in the future under the provisions of the act of July 5, 1884, could not be sufficiently and so accurately ascertained or approximated as to be specially provided for by one permanent act of appropriation, and a series of appropriations embodied in the annual appropriation bills for the service of each current fiscal year seemed to meet the requirement of such service in the future far better than one single act of appropriation of a permanent specific character for the entire service.

That act gave you authority for the survey of a class of lands then in condition to be surveyed, and also for the survey of other lands of the same class, when thereafter they might reach the proper condition. For the survey of these last an appropriation could not be previously made until the extent of the service was known.

Passing upon the question of a proper disposition of balances of appropriations where there has been a series of appropriations for a designated service, Attorney-General Cushing (7 Op., Att'y-Genl., 17) holds that—

First, these acts bear testimony to the truth of the general doctrine, that although it shall happen in any case that each appropriation be annual only in its terms, yet if there be a series of appropriations applicable to a continuous service, then those appropriations are to be treated as having a continuous relation.

Second, it is patent on the face of these acts that no question need arise of possible transfer to the surplus fund, because it is proper for the department (Treasury), in each successive year, to begin by expending any balance on hand of the appropriation of the previous year, and thus to carry forward to the succeeding year only the balance of the next preceding one.

The above evidently refers to a class of annual appropriations which have a continuous nature, respecting which it has been held that—

where the supplies or services appropriated for have a future continuing nature and purpose, and a contract is made in the fiscal year for which the appropriation is made, the contract may be extended even after that year, and the supplies or ser-

vices furnished or rendered in pursuance thereof may be paid for at any time within the two years limited by the act of June 20, 1874, (18 Stat. 110) after such fiscal year. (Comptroller's Decisions 2 Lawrence, 2d Ed., 247.)

For further and fuller authority upon this question, and appropriations and the unexpended balances thereof generally, *vide* Opinions of the Attorneys-General, Cushing (7 Op., 1); Akerman (13 Op., 289); Comptrollers' decisions (5 Lawrence, 447; 6 Lawrence, 30).

It has been held that where doubt exists as to what particular class an appropriation belongs, in such event the title of the act making the appropriation, though not inclusive, has much weight in settling the question.

The title of the act of August 5, 1892, under which, with many others, the appropriation of \$6,000 is contained, and the title of the preceding acts and the one following it, making provision for similar service relating to identical objects, is not conclusive, of itself, as to the character of the appropriation, for the reason that the titles of said acts cite the fact that the appropriations are for "sundry civil expenses of the government" for a designated fiscal year, "and for other purposes."

Notwithstanding the fact, however, that the titles of those acts contained the words "and for other purposes," yet the appropriations contained therein were made for the most part specifically, and almost solely, for the expenses of the services of a fiscal year therein named.

The appropriation made for the stated service, now under consideration, was preceded and followed by a class of appropriations annual in character, and contained in an act making appropriations for expenses of stated services, specifically for that particular fiscal year, and the appropriations for similar service especially designated in the annual appropriation bills, for some years past, were interjected between a class of appropriations for the service of those particular fiscal years.

By the recognized rule of construction deduced from the familiar maxim, *noscitur a sociis*, it has been held that "the character of one appropriation may be ascertained from that of others made in the same act, especially when made in the same form for similar service, and to be expended by the same officers." The entire series of appropriations which were based upon the act of July 5, 1884, *supra*, and preceded and followed, as stated, by appropriations, contained in the same acts, are only parts of one general system of appropriations for the survey and disposal of the public domain, and are to be construed *in pari materia*—as belonging to the same class of appropriations, and explanatory of each other. Where doubt remains respecting the class to which an appropriation belongs, the rule adhered to has been to resolve such doubt in favor of the class known as annual. That rule was doubtless, to a large extent, founded upon the general policy of the government, for many years past, requiring disbursing officers to make as early and frequent accountings for the public funds as possible.

By the tests herein applied and authorities cited, it is clear to my

mind that the appropriation of \$6,000 contained in the act of August 5, 1892, *supra*, is nothing more nor less than an annual appropriation made specifically for the service of that particular fiscal year, the precise period of time at and *during* which the same can be used or drawn against being regulated by the provision of section 3690, Revised Statutes, as follows—

All balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year, and remaining unexpended at the expiration of such fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year; and balances not needed for such purposes shall be carried to the surplus fund. This section, however, shall not apply to appropriations known as permanent or indefinite appropriations.

The amount of \$668 being an unexpended balance of an appropriation made specifically for the service of the fiscal year 1892-93, and not coming within the exceptions of the above section cannot be used for a service rendered or for payment of liability under contract awarded *after* expiration of fiscal year for which the appropriation was made, and under act of June 20, 1874 (18 Stat., 110, section 5), must, after remaining upon the books of the Treasury (as an unexpended balance) for two years, be carried to the surplus fund, and covered into the Treasury.

The rule and usage is well settled and fully recognized that any portion of an appropriation of the class known as "annual" and made specifically for the service of a designated fiscal year is available, for the expenses of such service, for three years from the time said appropriation became available, where the liability accrues under a contract awarded during the year for which the appropriation is made; or, in other words, the unexpended balance of any such appropriation may be drawn against within two years from the expiration of the fiscal year for which the appropriation was made—provided a contract be properly made within such fiscal year for such service.

RIGHT OF WAY—RESERVOIR—LAKES AND RIVERS.

PECOS IRRIGATION AND IMPROVEMENT CO.

The departmental regulations of February 20, 1894, under certain conditions, recognize the right to appropriate natural lakes or rivers for reservoir purposes.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 23, 1894. (F. W. C.)

With your office letter of May 23, 1893, was forwarded a motion filed on behalf of the Pecos Irrigation and Improvement Company for the review of departmental decision of November 19, 1892 (15 L. D., 470), which refused to approve said company's maps filed under the provisions

of the act of March 3, 1891 (20 Stat., 1095), showing the location of three reservoir sites, it being held that

A reservoir site can not be acquired by damming a river and overflowing the adjoining land where the stream in question carries a strong volume of water through all seasons.

In addition to said maps showing reservoir sites, two additional maps were filed by said company showing its northern and southern canals. Approval was withheld from the maps showing the canals because of conflicting statements in the application as to their width and also because the public lands were not designated upon the maps filed.

With your letter of February 6, 1894, the maps and accompanying papers showing the reservoir sites are again transmitted for consideration in connection with the company's motion and in said letter it is stated, referring to the maps showing the location of the canals: "The maps and field notes as amended are still unsatisfactory and will be returned to the company for correction."

The objection to said maps showing the location of canals is one merely of detail and no question is raised as to the action taken in the motion for review.

As to the maps filed showing the sites selected for reservoir purposes your said letter of February 6, 1894, states—

A re-examination discloses the fact that though the water lines of the reservoirs seem to have been surveyed with care, the representation on the maps has been very inaccurately drawn, and errors of several hundred feet in the position of the water line with regard to the line of survey are to be found in many places. In other words the map represents a water line very different from that shown by the field notes, hence the approval of the application would approve two considerably different water lines, and the local officers or intending settlers could not be sure whether the water line of the field notes or that of the map should control.

The motion for review asks a reconsideration of the principles upon which the former decision as to the reservoirs was made, and should the department decide that such reservoirs as these may be approved, I would respectfully recommend that the approval of these maps be withheld in order that the maps and field notes may be returned for correction in the particulars noted, and in several other minor disagreements between the maps and field notes.

The regulations concerning right of way for canals, ditches, and reservoirs over the public lands under the act of March 3, 1891 (*supra*), have recently been revised and were approved by me February 20, last (18 L. D., 168). Therein it is held (paragraph No. 1):—

This act is evidently designed to encourage the much needed work of constructing ditches, canals, and reservoirs, in the arid portion of the country by granting a right of way over the public lands necessary to the maintenance and use of the same.

The eighteenth section of the act in question provides that—"The privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States and Territories."

The control of the flow and use of the water is therefore a matter exclusively under State or Territorial control, the matter of administration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over the public lands.

In submitting maps for approval under this act, however, which in anywise appropriate natural sources of water supply, such as the damming of river or the appropriation of lakes, such maps should be accompanied by proof that the plans and purpose of the projectors have been regularly submitted and approved in accordance with the local laws or customs governing the use of water in the State or Territory in which the same is located.

No general rule can be adopted in regard to this matter. Each case must rest upon the showing filed in support thereof.

The previous holding of this Department, expressed in the circular approved March 21, 1892 (14 L. D., 338), as follows, viz.: "This act does not contemplate the appropriation, for reservoir purposes, of natural lakes that are already the source of water supply, nor the damming of rivers, so that the adjacent country is overflowed" is hereby overruled and set aside.

This would seem to overrule the principles upon which the previous action of this Department was predicated in refusing to approve the maps filed for reservoir purposes by this company and said decision, in so far as in conflict herewith is recalled and vacated and the maps forwarded with your letter of February 6, 1894, are herewith returned for your further examination under the regulations recently approved.

RAILROAD GRANT—ADJUSTMENT—ACT OF MARCH 3, 1887.

FLINT AND PERE MARQUETTE R. R. Co.

A statement furnished by the General Land Office as to the condition of a railroad grant with respect to its adjustment can not be regarded as the final adjustment of a grant contemplated by the act of March 3, 1887, where subsequent selections on account said grant are certified, and other selections remain unadjudicated.

It is no defense to action under the act of March 3, 1887, that the lands in question were certified in accordance with rulings of the Department prevailing at the date of the certification, if such rulings are in conflict with the decisions of the supreme court.

A rule to show cause why proceedings should not be instituted for the recovery of title to lands erroneously certified on account of a railroad grant, will not be dissolved on a disclaimer of interest filed by a successor to the benefits of the grant who has pending selections thereunder.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 23, 1894. (F. W. C.)

I have considered the answer made by the Flint and Pere Marquette Railroad Company, to the rule served by your office to show cause why certain lands, erroneously certified under the grant made by the act of June 3, 1856 (11 Stat., 21), should not be reconveyed to the United States as contemplated by the act of March 3, 1887 (24 Stat., 556).

The lands involved are set forth in a list "A" accompanying your letter, and aggregate 21,761.61 acres, and were approved to the State under the grant of 1856, for the benefit of the Flint and Pere Marquette R. R. Co., in approved list dated December 1, 1862.

They are within the primary limits of the grant and opposite the location shown upon the map filed on August 18, 1857.

Your action in holding these lands to have been erroneously certified, rests upon the ground that they were in a state of reservation, both at the date of the act and of the definite location of the road, and were hence not in a condition to pass under said grant.

The facts relative to said reservation, as stated in your letter, are as follows:

On May 16, 1855, a withdrawal for Indian purposes was made of lands previously subject to entry (in contemplation of certain arrangements to be made with the Indians of Michigan), in pursuance of an order of the President, made upon the recommendation of the Commissioner of Indian Affairs (See Report Commr. Ind. Af. 1878, p. 253 & 254), and was of townships, 13, 14, 15 and 16 north of ranges 3, 4, 5 and 6 W. (all in Isabella county), and was made upon "the express condition that no peculiar or exclusive claim to any of the lands so withdrawn, can be acquired by said Indians, for, whose future benefit it is understood to be made, until after they shall by future legislation, be invested with the legal title thereto."

By treaty of August 2, 1855, ratified June 21, 1856, it was stipulated that six adjoining townships in Isabella county, to be selected by the Indians, should be set apart for them.

On April 14, 1859, the Commissioner of Indian Affairs reported that the six townships allotted to the Indians under said treaty, had been selected, and that the other townships not needed for Indian purposes might be regarded as a part of the public domain. The lands thus released from the withdrawal for the Indians are the ones now in controversy, and it appears that they were never restored to the public domain, but, on December 1st, 1862, were listed and approved to the State for the benefit of the company.

This same order embraced lands within the limit of the grant made by the same act of June 3, 1856 (*supra*), for a railroad, the grant to aid in the construction of which was conferred upon the Grand Rapid and Indiana R. R. Company, and by my letter of October 17, 1893 (17 I. D., 420), it was held that said order excepted the lands embraced therein from the grant to said company.

For the reasons therein given, I hold that the lands in question were erroneously certified for the benefit of the Flint and Pere Marquette R. R. Company.

In its answer the company practically conceded the correctness of this position, but claim: first, that the grant can not be considered as "*unadjusted*" within the meaning of the act of March 3, 1887 (*supra*); second, that the certifications were made after due consideration and decision of the question as to whether they were excepted from the grant, and consequently it was not inadvertently done, nor was it a mere clerical error; third, the old corporation in whose favor the certifications were made became embarrassed and was unable to pay interest on its obligations, and a bill was filed in the United States circuit court for the eastern district of Michigan in 1879, for the foreclosure of its mortgages, resulting in a decree of sale made in August, 1880 under which the creditors became the purchaser, and organized a new company under the old name; further, that the old company, before foreclosure, sold and disposed of every acre of land within the grant, and should the title which was given by the old company before its

dissolution be now questioned, the purchasers of said lands would be the sufferers.

It is first necessary to consider whether this grant can be properly considered as "unadjusted," for if it can not, no suit should be recommended.

It is claimed that on March 29, 1865, Mr. Jos. S. Wilson, acting commissioner of the General Land Office, addressed a letter to Morgan L. Drake, making a statement of the condition of the grant in question, being as follows:

	Acres.
Total area of granted sections.....	586, 828. 73
Amount of lands certified within the 6 miles limits.....	258, 947. 11
Amount of indemnity lands 15 miles limits.....	252, 478. 89
	511, 425. 90
Indemnity deficiency	75, 402. 83

I learn from inquiry at your office that certifications were made on account of this grant subsequent to March 29, 1865, to the amount of 426.56 acres, within the granted limits, and 736.91 acres within the indemnity limits; that the last certifications were made October 19, 1872.

I also learn that on May 30, 1881, selection was made of 197.30 acres by Wm. L. Webber, land agent of the Flint and Pere Marquette R. R. Co., upon which no action has been taken.

It would therefore appear that this grant was not adjusted in 1865, and that it is still open with pending selections.

As to the second ground of the answer, it may be admitted that the certifications when made were, after due consideration and in accordance with the rulings then prevailing, but the directions given in the act of 1887, are that these grants shall be adjusted in accordance with the decisions of the supreme court.

It is well settled by the decisions of that court that lands reserved at the date of the grant and of the date of definite location, do not pass under grants made to aid in the construction of railroads. *Leavenworth, Lawrence and Galveston R. R. Co. v. United States*, 92 U. S., 733; *Bardon v. Nor. Pac. R. R.*, 148 U. S., 535.

This defense was fully considered in the case of the Winona and St. Peter R. R. Co. (9 L. D., 649), wherein it was held that it is no defense to action under the act of March 3, 1887 (*supra*), that the lands in question were certified in accordance with rulings prevailing at the date of the certifications, if such rulings are in conflict with the decisions of the supreme court.

As to the final claim made in the answer, I call attention to the fact that the selections made in 1881, after the dissolution of the old company, were made by the same person who now makes answer to the rule in question.

It is plain that the new company claims to have succeeded to the old grant, for, as before stated, it has selections pending made thereunder;

further, as it has succeeded to the benefits derived from the grant, I do not think this office would be justified in dissolving the rule upon its disclaimer of interest, but rather that demand should be made upon it as contemplated by the act of 1887, and its present answer might be made before the court in defense of the proposed suit, and thus its responsibility under purchase at the foreclosure sale, will be judicially determined.

It may be here stated that the act makes due provision for the protection of *bona fide* purchasers of the company, and provides for demand of the company for the government price of the lands.

In the case of the Alabama and Chattanooga R. R. Co., the road was sold under foreclosure proceedings and the lands were bought by the Alabama State Land Company.

In the matter of the recovery of certain lands because erroneously approved, demand was directed to be made of said Land Company, and it was held,—

as far as the government is concerned, it matters not whether the tracts thus erroneously certified are found in the possession of the original grantee, or in the possession of a second or third grantee. Its duty under the commands of the adjustment act, is to take steps to compel the restoration thereof. *U. S. v. Alabama State Land Co.* (14 L. D., 129).

You will make the demand as before directed and at proper time report action taken.

SWAMP LAND—INDEMNITY—WAIVER.

STATE OF ILLINOIS.

The State will be held to have waived its claim to a tract where the special agent of the government notes the claim as abandoned in his report, and such action appears to have been in accordance with the intention of the State at the time.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 26, 1894. (P. J. C.)

I have considered the appeal of the State of Illinois, filed by Isaac R. Hitt, as "state and county agent," from your office decision of April 9, 1892, in the matter of the claim of the State for indemnity for certain alleged swamp and overflowed lands in Franklin county, therein enumerated.

It appears that the agent of the State filed a claim for certain lands for which cash indemnity was asked, under the provisions of the act of Congress of March 2, 1855 (10 Stat., 634), and March 3, 1857 (11 Stat., 251).

In your said office letter it is stated—

After eliminating such tracts as were within the six mile limits of the Illinois Central Railroad; those sold or disposed of prior to September 29, 1850; those already pat-

ented to the State as swamp-land and those sold or located subsequent to March 3, 1857, the residue of the lands embraced in the claims filed by Mr. Hitt, was sent to Special Agent H. A. Myers for examination in the field. As a result of Agent Myers' report and findings, which were approved by this office, cash indemnity on 5,735.21 acres, amounting to \$2,062.48 was allowed November 20, 1882, and on December 21, 1883, an additional payment on 600 acres, amounting to \$120 was made. Total allowances \$3,623.72.

In the report of Agent Myers, the tracts described below were classed as dry land and not of the character contemplated by the swamp-land act of September 28, 1850, and the claim for cash indemnity therefor should have been rejected when the adjustments were made. After each one of the tracts referred to Agent Myers states: "Claim abandoned by the State. No proof offered."

In view of the facts above recited the claim for cash indemnity to the following tracts is this day held for rejection, subject to appeal within sixty days.

The "state and county agent" appealed from your office decision, assigning as error, "no waiver was filed or made by the state and county agent, and witnesses were not found at the time the special agent made his investigation."

An examination of the report of the special agent, dated May 22, 1882, discloses the fact that opposite each of the tracts claimed is this notation: "Claim abandoned by State — Dry — No proof." In the light of this notation, it is difficult to understand, in the absence of any argument, what specific error appellant complains of; but I think some light may be thrown on the action of the special agent by copies of letters I find in the files. On April 14, 1880, Mr. Hitt, as "state agent," addressed the following letter to the Commissioner of the General Land Office—

There are frequently tracts of land included in the list of swamp-land selections from Illinois, which you have furnished your special agent with instructions to examine same, which I find after the list reaches Mr. Walker can not be proven to be S. & O. (swamp and overflowed) within the meaning of the law and under your instructions. I therefore ask that you instruct your special agent to strike from his list such tracts of land as I may request it of him in writing, and thus save expense both to the State and general government. Please reply at an early date.

On April 19, following your predecessor sent the following letter to the special agent, and on the same day forwarded a copy of it to Mr. Hitt:

I am in receipt of your letter of the 14th inst. advising me that the State does not wish to present proof on tracts, that are shown upon examination, not to be swamp or overflowed within the meaning of the grant of 28th, September, 1850, and the State agent desires to have such tract stricken from the lists.

Your instructions require you to report on all of the tracts for which the State claims indemnity. You will therefore note opposite each tract, that upon examination you find is not of the character contemplated by the grant, not swamp or overflowed as the case may be, and also add the State declines to present proof on this tract.

It will thus be seen that, while the Commissioner did not require that the list of tracts that the State did not want to investigate, should be in writing, yet he did instruct him to make the notations that "the State declined to present proof on this tract." I think, therefore that it is fair to assume that the State did in this manner waive all its

rights to the tracts in controversy. It occurs to me that this presumption may be indulged from the further fact that when the report was made upon the tracts determined to be within the meaning of the swamp-land grant of September 28, 1850 (4 Stat., 219), and settlement was made with the State for them, that the State did not then move in the matter and seek to have those further investigated that had been rejected. It is true that the State did not have formal notice of the rejection of these selections at the time, but it is reasonable to suppose that it knew it nevertheless, and accepted the result as final.

I think I am fully justified in saying that when the special agent was present and made the examination, that he was there for the purpose of complying with the rules governing such investigations. (Instructions of August 12, 1878, 5 C. L. O., 173.) By these instructions he was required to make personal examination of the tracts. After this was done he was required to give the State thirty days notice of the time and place where testimony would be received touching the character of the tracts rejected by him. The report of the agent is that the State offered no proof. Now, if the State had an opportunity to prove these tracts swamp or overflowed, and neglected to do so, it will certainly not be allowed to come in at this late day and complain. There must be an end to these matters sometime; but it can never come if the State or its agents are to be permitted to try the cases by piecemeal.

It will be observed that this proceeding was had before the promulgation of the instructions of September 18, 1891 (13 L. D., 301), which require a waiver on the part of the State of all claims for indemnity under the acts in question, on account of the failure to secure title to other swamp-lands if there be such, in townships where the present claims originate. It was not the practice of your office at that time to require formal written waiver on the part of the State, but to accept the waiver of the State in accordance with the instructions of April 19, 1880.

Your judgment is therefore affirmed.

RAILROAD GRANT—ACT OF JUNE 22, 1874.

SOUTHERN PACIFIC R. R. Co. (ON REVIEW).

The act of June 22, 1874, intended to confer upon railroad companies the right to select any unappropriated, non-mineral lands, within the limits of their grants that were subject to entry and disposal under the general land laws at the date of selection, in exchange for lands relinquished under the provisions of said act.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 26, 1894. (E. F. B.)

On April 30, 1892, the Department refused to approve list No. 3 of lands selected by the Southern Pacific Railroad Company, in lieu of

certain odd sections of land relinquished by it under the provisions of the act of June 22, 1874 (18 Stat., 194), upon the ground that the lands embraced in said list were segregated, or should have been segregated, as swamp lands.

Upon a motion for review of this decision, it was held that such ruling was erroneous, but the action of the Department in refusing to approve said list was sustained, upon the ground that the lands selected were even numbered sections within the granted limits of said road.

Since the decision of the supremecourt in the case of the United States *v.* the Missouri, Kansas and Texas Railway Company (141 U. S., 358), the practice of the Department theretofore, in permitting selections to be made by railroad companies of the alternate reserved sections within the primary limits of their grants, in lieu of lands relinquished by the companies under the act of June 22, 1874, is held to be erroneous, and should be discontinued. (Southern Pacific Railroad Company, 15 L. D., 460.)

By this decision a different construction was given to the act of June 22, 1874, from that which had uniformly obtained from the passage of the act until the date of said decision.

The Department is now petitioned to reconsider said ruling, and to allow the company to be heard thereupon, as the question was not suggested in the original decision, but was presented for the first time in the decision upon the motion for review. In view thereof, I have entertained said petition, and, as the rights of all railroad companies having similar land grants are affected by said decision, I have permitted other companies to intervene and be heard upon this petition.

The act of June 22, 1874, *supra*, entitled "An act for the relief of settlers on railroad lands," provides:

That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided*, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes: *And provided further*, That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a pre-emption or homestead settler after the location of the line of the road and prior to the notice to the local land office of the withdrawal of such lands from market.

Under this act the Southern Pacific Railroad Company, whose grant is of the alternate sections designated by odd numbers, relinquished

certain odd numbered sections within the limits of its grant in favor of settlers, and selected in lieu thereof an equal quantity of other lands within the primary limits of the grant, designated by even numbers. It is not questioned that the right of the railroad company to the lands relinquished had attached prior to the occupancy or entry by the settlers in whose favor said relinquishments were made, or that the selections were not made in accordance with the practice then prevailing, but said list of selections was rejected, because it was held that under the authority of the decision of the supreme court in the case of *United States v. Missouri, Kansas and Texas Railway Company*, *supra*, the alternate reserved sections within the limits of a railroad grant are not subject to selection under the act of June 22, 1874, for the reason that they are not public lands within the meaning of the act—being reserved by the grant—and such lands were specially excepted from the operation of the act of June 22, 1874, by the words “or to extend to lands reserved in any land grant made for railroad purposes,” which occur in the proviso to said act.

A contemporaneous construction of a statute by the Department charged with the duty of executing the law which has been uniformly and consistently maintained for eighteen years, under which vast property interests have attached, should not be changed, unless it is clearly shown to be erroneous. Such construction has been declared to be generally the best construction.

It gives the sense of the community as to the terms made use of by the legislature. If there is ambiguity in the language, the understanding of the application of it, when the statute first goes into operation, sanctioned by long acquiescence on the part of the legislative and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. (*Sutherland on Statutory Construction*, Sec. 307.)

In the application of this rule to the decisions of the executive departments upon the construction of statutes, the supreme court, in the case of *United States v. Philbrick*, 120 U. S., 52, say:

A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight, and since it is not clear that that construction was erroneous, it ought not now to be overruled.

Hence, if it is not clearly shown that the construction given to the act of June 22, 1874, by the Department prior to the decision of November 17, 1892, is clearly erroneous, it ought not to be changed by reason of any doubt that may arise from expressions used by the court of last resort in the construction of another statute.

The act of June 22, 1874, is a remedial statute, intended for the protection and relief of settlers on lands granted to railroad companies. The relief contemplated by the act could not be afforded, except with the consent and co-operation of the railroad companies. Hence, in order to afford this relief, it was necessary to authorize the railroad companies, upon the filing of a relinquishment of the lands granted, to select in lieu thereof an equal quantity of land from any of the public lands

within the limits of the grant not otherwise appropriated. That the company should be entitled to lands equally valuable and accessible in exchange for the relinquished or surrendered lands is plainly manifest from the express language of the act, which is free from all ambiguity. It expressly declares that, if any of the lands granted be found in the possession of an actual settler, whose entry or filing has been allowed subsequent to the time when by the decision of the land office the rights of the road were declared to have attached, the grantee may, upon a proper relinquishment of the land granted, be entitled to select an equal quantity of other lands in lieu thereof from *any* of the *public lands*, not mineral, *within the limits of the grant*, not otherwise appropriated at the date of selection.

The limits of the grant include both the granted and indemnity limits, and the term "public lands" includes all lands that are subject to sale and disposal under the general laws. Hence, the broad and comprehensive language of the enacting clause would include all lands within the limits of the grant, not otherwise appropriated, that were subject to sale and disposal by the United States at the date of selection, unless the right of selection was restricted by the proviso, and there does not appear to be any purpose or object to be subserved by withholding from selection any lands within the granted limits not appropriated and subject to disposal under the general land laws.

The express language of the enacting clause clearly indicating that it was the purpose of the legislature to authorize an exchange of equivalent lands for lands relinquished by the company, by selection from *any* of the unappropriated public lands within the limits of the grant, the proviso must be so construed as to effectuate that intent and purpose, and not to defeat it.

To ascertain the true intent and meaning of the proviso, it must be considered in its entirety and with reference to the purpose of the act, as expressed and indicated by the enacting clause.

A well established rule of construction is that "the sound interpretation and true meaning of a statute, on a view of the enacting clause and proviso, taken and construed together, is to prevail," (Endlich on Interpretation, Sec. 185) and where a proviso "follows and restricts an enacting clause, general in its scope and language, it is to be strictly construed and limited to the objects fairly within its terms." (Ibid., Sec. 186; Sutherland on Statutory Construction, Sec. 223; United States v. Dickson, 15 Pet., 141.)

Construed in the light of this authority, it is apparent that the proviso was intended to operate solely as a limitation or restriction upon the right of any railroad company to select other lands, in lieu of lands which had been reserved or excepted from the operation of the grant, and was not intended to qualify or in any manner restrict the right of the railroad company as to the class of lands from which selection might be made, in lieu of lands properly relinquished.

The words "not otherwise appropriated at the date of selection," occurring in the body of the act, were intended to limit the operation of the statute as to what lands might be selected. Those words are sufficiently broad and comprehensive to operate as a restriction upon the right to select any lands that were not free from claim or right at the date of selection, or which had been specifically reserved by the government for other purposes, and, as the enacting clause is general in its scope and language, the proviso must be limited to the object fairly within its terms.

The sole object of the proviso was to prevent any construction of the act by which the grant to any railroad company might be enlarged or extended by the acquiring of additional lands, and the words "or to extend to lands reserved in any land grant made for railroad purposes," must be construed with reference to such general intent and purpose as expressed and indicated by the full text of the act.

This view is clearly sustained by reference to the history of the times and to the motives that prompted the passage of the act.

It is needful in the construction of all instruments to read them in view of all the surrounding facts. To understand their purport and intended application, one should, as far as possible, be placed in a situation to see the subject from the maker's standpoint and study his language with that outlook. Statutes are no exception.

(Sutherland on Statutory Construction, Sec. 300)

In the case of *Pratt v. Union Pacific Railroad Company* (99 U. S., 48,) the supreme court say:

But in endeavoring to ascertain what the Congress of 1862 intended, we must, as far as possible, place ourselves in the light that Congress enjoyed, look at things as they appeared to it, and discover its purpose from the things as they appeared to it, and discover its purpose from the language used in connection with the attending circumstances.

At the date of the passage of the act it was known to Congress and the Department that numerous settlements had been made upon odd sections within the limits of railroad grants, subsequent to the time when, by the decision of the land office, the right of the railroad company was declared to have attached. This was the date of the filing and approval of the map of definite location in the General Land Office. The fact of such filing was not only unknown to the settler, but also to the local officers. In many instances, long periods elapsed before notice of the filing of the map and withdrawal thereunder was received at the local office, and hence settlers, in ignorance of the rights of the railroad companies, settled in good faith upon odd numbered sections, the title to which had vested in the company, and, in some instances, the local officers had allowed entries upon the lands. The condition of the settlers could not be relieved, unless the railroad companies could be induced to relinquish their right to the granted land settled upon and to take other land in lieu thereof.

With a view to relieve the settler from his embarrassed condition, a bill was drafted in the office of the Commissioner of the General Land

Office, and submitted to Congress with the recommendation that it be passed. This draft, as subsequently amended, was passed as the act of June 22, 1874. In transmitting the draft of the bill to Senator Win-
dom, the Commissioner, in a letter dated March 13, 1874, said:

As an inducement to the companies to so relinquish, the right to select other land in lieu of those surrendered should be secured to said companies. The selections might be allowed from the alternate government sections within the limits of the grant, not otherwise appropriated at the date of selection.

In a letter, dated March 23, 1874, to Hon. J. T. Averill, of the House of Representatives, the Commissioner, in speaking of the proposed bill, said:

After careful study, and from my experience in the examination of this class of claims, I am convinced that the only remedy which can be provided by law is one depending upon, and authorizing the consent of parties to a settlement by which the rights and equities of both parties can be recognized. This may be done by offering an inducement to the railroad companies to relinquish the lands. It seems to me they will, in most cases, gladly avail themselves of an opportunity to secure the good will, and relieve the hardships of actual settlers along their routes, if they can at the same time receive their full compensation in kind for the tracts surrendered, by taking an equal amount from the public lands of the government in the same vicinity, and of equal value.

The draft of the bill submitted by the Commissioner contained only the enacting clause, and appears to have been first amended in the House. When it was put upon its passage in the Senate the mineral clause was first inserted as an amendment, and the following proceedings were had upon the bill:

Mr. Hager. The next amendment is on page 2, line 20, after the word "railroad," to insert "or to extend to lands reserved in any land grant made for railroad purposes," so as to read:

"That nothing herein contained shall in any manner be so construed as to enlarge the grant to any such railroad, or to extend to lands reserved in any land grant made for railroad purposes.

Mr. Edmunds. I should like to have that read again and explained.

The amendment was again read.

Mr. Edmunds. What does that mean?

Mr. Hager. I will state to the Senator that in the act granting lands for the construction of the railroad from the Missouri River to the Pacific Ocean certain exemptions are made.

These words are to be found in section 3 of that act granting lands "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the route of said road was definitely fixed." The object is not to give new lands in place of those that were reserved by section 3. With this provision, in case they are entitled to new lands, I presume they would be entitled to those that are really exempted by the act itself. It is for the benefit of the country, for the benefit of the government, and not for the benefit of the railroads, that I propose the amendment.

The amendment was agreed to.

Mr. Edmunds. I am a little shy about these bills, because I do not understand them; but I will move to amend the bill by inserting after the word "enlarge" in line 19, the words "or extend," and striking out the word "the" and inserting "any," so that it will read:

That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to said railroad.

The bill, as amended, was passed.

In view of the clear and comprehensive statement by the Commissioner of the General Land Office as to what lands might be selected by the company as an inducement to the companies to relinquish the lands settled upon, can there be any possible doubt that the clear and expressed purpose of the act was to allow the companies to select an equal quantity of lands "from the alternate government sections within the limits of the grant," in lieu of those surrendered by the companies, "by taking an equal amount from the public lands of the government in the same vicinity and of equal value."

And is it not equally clear that the words "or to extend to lands reserved in any land grant made for railroad purposes" were merely inserted to make certain the purpose and object of the proviso, which was to prevent the grant from being enlarged or extended by getting new lands that were reserved by the granting act?

This purpose is so clearly expressed and defined by the author of the amendment that it can not admit of any other construction.

It will be observed that the grant to which he referred makes no provision for indemnity for the sections of the designated numbers granted that were sold, reserved, or otherwise disposed of by the United States, and to which a homestead claim had attached at the date of definite location. If these sections could have formed the basis for the right of selection, it would have enlarged and extended the grant, and, hence, the author of the amendment says: "The object is not to give new lands in place of those that were reserved by section 3. With this provision, in case they are entitled to new lands, I presume they would be entitled to those that are really exempted by the act itself."

But conceding that the proviso was intended to operate as a restriction upon the right to select lands reserved in any land grant made for railroad purposes, although unappropriated at date of selection, it does not follow that the decision of the supreme court in the case of *Missouri, Kansas and Texas Railway Company v. United States* is authority for a denial of the right to select unappropriated, alternate sections within the limits of the grant, in lieu of granted sections relinquished by the company under the provisions of the act.

Generally, grants to railroad companies are of all the odd numbered sections within certain limits, not *reserved*, sold, granted or otherwise appropriated at date of definite location. Lands, falling within these conditions at the date when the grant attaches, are excepted from its operation, and hence reserved out of it. The alternate sections, not of designated numbers granted, are not included in the grant by any terms, and hence no words of reservation were necessary to except or reserve them from its operation. They remained the property of the United States, subject to disposal under the general land laws, and, although

they were raised in price to double minimum, their character as public lands was not changed, nor were they reserved in the sense that that word is commonly used in land grants. The enhanced value of such lands was by reason of their proximity to the railroad, and it could not have been contemplated by Congress that the company would voluntarily relinquish lands of equal value with the alternate sections for single minimum lands in the indemnity limits.

I think it is therefore evident that the words "lands reserved in any land grant," as used in the proviso, had reference solely to such sections of the designated numbers as were excepted from the operation of the grant, by reason of their condition at date of definite location. The decision of the supreme court in the case of *Missouri, Kansas and Texas Railway Company v. United States* is not in conflict with this view.

In that case a grant was made, in 1863, for the benefit of a railroad company of every alternate section designated by odd numbers, for ten sections in width on each side, and provided that the sections or parts of sections which by such grant shall remain to the United States, within ten miles on each side of said road (even sections), shall not be sold for less than the double minimum price.

By a subsequent act, passed in 1866, a grant was made for the benefit of another company of every alternate section of land designated by odd numbers to the extent of five sections per mile on each side of said road, with the right to select from the public lands of the United States nearest to the sections above specified, as indemnity for such of the designated sections granted, as the United States may have sold, reserved or otherwise appropriated, or to which the right of pre-emption or homestead had attached at date of definite location:

Provided, That any and all lands heretofore reserved to the United States by any act of Congress or in other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purposes whatever, be and the same are hereby reserved and excepted from the operation of this act.

The routes of these two roads crossed each other, so that some of the even numbered sections, within the primary limits of the first grant, fell within the indemnity limits of the second. The question presented to the court was, whether such sections were subject to selection by the grantee under the second or later grant. The court held that such sections were reserved to the United States by the grant of 1863, and hence were not subject to selection under the later grant, for the reason that the grant of 1866 specifically excepted from its operations any and all lands that had been reserved to the United States by any act of Congress, for the purpose of aiding in any object of internal improvement, or other purpose whatever. In other words, the court held that "Such even numbered sections in the place limits were therefore referred to in the second section of the act of 1863 as 'reserved sections' that 'remain to the United States,'" and such lands were by the plain language of the proviso excluded from the operation of the grant of 1866.

The act under consideration by the court, in the case above referred to, was a grant subject to strict construction, and the conclusion arrived at by the court, as to the meaning of the words "lands reserved to the United States for any purpose whatever," found ample support in the express language of the act. On the contrary, the act of June 22, 1874, was a remedial statute, which should be—

construed liberally, to carry out the purpose of the enactment, suppress the mischief and advance the remedy contemplated by the Legislature; *i. e.*, and this is all that liberal construction consists in—they are to be construed "giving the words . . .

. . . the largest, the fullest, and most extensive meaning of which they are susceptible." The object of this kind of statutes being to cure a weakness in the old law, to supply an omission, to enforce a right, or to redress a wrong, it is but reasonable to suppose that the Legislature intended to do so as effectually, broadly and completely, as the language used, when understood in its most extensive signification, would indicate.

(Endlich on the Interpretation of Statutes, Sec 107.)

It is apparent, as before stated, that the act of June 22, 1874, intended to confer upon the railroad company the right to select any unappropriated, non-mineral lands within the limits of its grant that were subject to entry and disposal under the general land laws at the date of selection, in exchange for lands relinquished under the provisions of the act, and therefore the words "lands reserved in any land grant" could not be construed to include the alternate, reserved sections in any grant, without defeating the clear intent and purpose of the act.

The decision of November 17, 1892, so far as it holds that the alternate sections within the limits of the grant are not subject to selection under the act of June 22, 1874, is therefore revoked, and you will re-submit the list for re-examination.

INDIAN LANDS—ALLOTMENT—PATENT.

DAVID LAUGHTON.

The Department has the authority to correct rolls of Indian allottees whenever it is clearly shown that a mistake has been made, and to correct a patent issued on an erroneous roll to make it correspond with the correction, at least in cases where the patent has not been delivered to any one claiming under it, or gone out of the possession of the Department.

The decision in the case of Lizzie Stricker, 15 L. D., 74, overruled.

Secretary Smith to the Commissioner of Indian Affairs, March 30, 1894.
(W. C. P.)

With your letter of September 6, 1893, you submitted to this Department for my views thereon a draught of a letter to Messrs. Harrison and Adams of Topeka, Kansas, in relation to the correction of a mistake in a patent heretofore issued to David Laughton, deceased.

It seems that on the list of allotments to Citizen Pottawatomie Indians under the provisions of the treaty of February 27, 1867, the name of David Laughton appears as a deceased allottee and that patent was

afterwards issued in accordance with that list. It is now stated that David Laughton is still living, that he is now carried on the roll of the Citizen Pottawatomie Indians, and it is asked that said list No. 3 be corrected in accordance with the facts and that patent be issued to said Laughton as an original allottee.

In your letter to Laughton's attorneys, which is submitted for my views thereon, it is held that since the patent was issued in conformity with the record it would not need change by this Department and the cases of Frank Sullivan (14 L. D. 389) and Thaddeus McNulty (14 L. D. 534) are cited in support of that conclusion. You express the opinion, however, that inasmuch as the *habendum* clause of the patent runs: "Unto the said David and to his heirs and assigns forever,"—thus giving Laughton the unconditional fee simple title to the lands—no correction is necessary.

While this may be true yet the patent describes said Laughton as deceased, and should be corrected if this Department has authority to make such correction.

In addition to the authority cited by you there is the decision in the case of Lizzie Stricker (15 L. D., 74) which is more like the case under consideration. There a patent was issued under the general allotment act in the name of Lucy Stricker described as a Yankton Sioux Indian. It was afterwards shown that the name should have been Lizzie Stricker and your office recommended that said patent be canceled and a new issued in the proper name. The matter was referred to the Assistant Attorney General for this Department, who held in his opinion that the patent having issued in conformity with the record this Department has no authority to cancel the same and issue a new one in the correct name; and this opinion was adopted by the Department.

Your conclusion that this Department would not grant the relief asked for even were it shown that an error in the rolls existed is justified by the authorities. I am not, however, satisfied that the rule announced by these decisions should be followed in this case. The roll upon which this patent was issued was prepared by the officers of this Department and not by the patentee. It would seem unjust to make the allottee suffer for a mistake which he is not chargeable with, and which he could not prevent.

This Department is charged with looking after and protecting the interest of the Indians in such matters as this. The government stands in a different relation to these people from that which it sustains to others seeking to obtain title to a portion of the public domain. The Indians are recognized as unfit and incapable of protecting themselves, and therefore as entitled to demand that their interests shall be carefully conserved by this Department under whose care they have been placed.

Under these circumstances it seems unjust, if not a betrayal of the trust, to say to the Indians it is true a mistake has been made by which

you suffer but this Department will not correct that mistake for which it alone is responsible. I am of the opinion that this Department has the authority, and that it is its imperative duty, to correct rolls of Indian allottees whenever it is clearly shown that a mistake has been made, and to correct a patent issued on the erroneous roll to make it correspond to the corrected one, at least in those cases where the patent has never, in fact, been delivered to anyone claiming under it, or gone out of the possession of the Department.

Holding these views, and believing that justice demands the correction of these rolls, I hereby direct that David Laughton be called upon to furnish satisfactory proof of his identity with the party attempted to be described on said rolls, and when that is furnished, you will cause said rolls to be corrected in accordance with the facts thus shown. After that the steps necessary to cancel the outstanding patent and issue a new one to correspond with such corrected rolls will be taken. To that end it will probably be necessary to know whether the old patent has gone out of the possession of the Department and if so to whom it was delivered and the facts as to who is and has been in possession of the land.

The decision in the case of Lizzie Stricker (15 L. D., 74) is hereby overruled, so far as it conflicts with the views herein expressed.

DISTRICT OF COLUMBIA—JOINT RESOLUTION, FEBRUARY 16, 1839.

REGULATIONS.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (J. I. P.)

By letter "E" of March 6, 1890, your office transmitted to this Department a copy of the "Regulations of August, 1839, for carrying into effect a joint resolution of Congress approved February 16, 1839, directing the manner in which certain laws of the District of Columbia shall be executed," said regulations having been prepared by the Secretary of the Treasury, under the provisions of the joint resolution mentioned.

It is suggested by your office in said communication, that the 4th and 5th paragraphs of said regulations should be amended, for the reasons that the persons designated therein as Examiner General, and Judge of the Land Office, respectively, have long since ceased to act in that capacity, and you further suggest that the said officers be required to file their official oaths in the Department of the Interior previous to their entrance on duty, instead of in the Treasury Department, as ordered in the 6th regulation of August, 1839. The necessity for such amendment is shown to exist because of the fact that there is pending before your office an application for a piece of vacant land in the District of Columbia, and that in the absence of such officers, duly appointed

and sworn the title cannot be consummated and vested in the applicant, under the provisions of the resolution of Congress aforesaid.

It is further suggested that in order to make said offices impersonal and continuing, the Assistant Commissioner of the General Land Office be appointed "Judge of the General Land Office," and the Principal Clerk of Surveys be appointed "Examiner General."

In reply I have to say that your suggestions are concurred in; and under the authority vested in the Secretary of the Interior, by the third section of the act of March 3, 1849 (United States Statutes, Vol. 9, p. 395) I have issued regulations with reference to said matter, embodying the suggestions made by your office, with the following addition: On examination I have discovered that the county of Washington as a municipality is no longer in existence, having been superseded by the District of Columbia. The duties of the surveyor of said county, therefore, which are required by said joint resolution, will be performed by the surveyor of the District of Columbia.

A copy of said regulations is transmitted herewith.

DEPARTMENT OF THE INTERIOR,

Washington, March 31, 1894.

Regulations for carrying into effect a joint resolution of Congress, approved February 16, 1839, "directing the manner in which certain laws of the District of Columbia shall be executed."

1st. The Treasurer of the United States is, in reference to lands in the County of Washington, charged with the duties of Treasurer of the Western Shore of Maryland, and will execute the same agreeably to the laws of Maryland in force the 27th day of February, 1801.

2d. With the modification herein contained, the Commissioner of the General Land Office, in like manner will discharge the duties of Register.

3d. The County Surveyor of the County of Washington, is required by the resolution to execute warrants to him directed. But in view of the fact that the County of Washington no longer exists as a municipal organization, having been superseded by the District of Columbia, by the act of 1871 (16 Stat., 419), the duties of said County Surveyor will be performed by the Surveyor of the District of Columbia.

4th. The Principal Clerk of Surveys of the General Land Office, is appointed Examiner General, and will discharge the duties appertaining to said office.

5th. The Assistant Commissioner of the General Land Office is appointed Judge of the Land Office, for the purpose of carrying into effect said resolution.

6th. The officers hereby appointed, will each take an oath before a person competent to administer the same, faithfully and impartially to execute the duties appertaining to their respective offices; which oath

shall be filed in the Interior Department previous to their entrance upon duty.

7th. The forms of titlings, warrants, and other proceedings, with such modifications as the change of jurisdiction has made necessary, shall be the same as were in use in the State of Maryland at the date of the cession of Washington; and no other substantial variation shall be allowed.

8th. The rules respecting the practical operations and mode of proceeding in the Western Shore Land Office, will be gathered from the Land Holder's Assistant; and, until otherwise directed, the same will be followed as the general guide in executing the aforesaid resolution.

9th. A person wishing to appropriate land by an original warrant, will, in the first place, go to the Treasurer of the United States, file his application and his affidavit, setting forth that there is, according to his information and belief, such land as he desires to appropriate; that his intention is bona fide to secure it; and that his application is not made with the intent or desire to harass or vex any person whatsoever; and thereupon, on payment of the money required by law, the Treasurer will issue the titling or order directed to the Commissioner of the General Land Office, requiring him to issue to, and in the name of, the person therein mentioned, a warrant, common or special, as the case may be, for the number of acres paid for as aforesaid; and if a special warrant, the Commissioner shall insert the location or description given in writing by the applicant.

10th. Applications for warrants of resurvey will be made in the first instance to the Commissioner of the General Land Office, who will require an affidavit, which, in addition to the facts required to be stated in the affidavit to be filed with the Treasurer, must state the applicant's belief that he has perfect title to the tract sought to be resurveyed, and adjoining the vacancy which is designated to be secured, and also must produce his title papers.

11th. The Commissioner will consider no application unless it be made in writing, and within the business days of the week, and during office hours.

To prevent contests about priority, he will endorse the precise hour of filing each and every application, and he will file them in order of presentation, and keep a record of the same in a book to be kept for that purpose.

12th. The Surveyor of Washington County will execute warrants according to law, and such instructions as he may, from time to time receive from the Judge of the Land Office, and when executed, will make his return to the Commissioner, who having registered the return, will forthwith deliver it to the Examiner General, and if reported correct, and no caveat shall have been filed within the time prescribed by law, on proof of complete payment a patent shall be issued.

13th. Should a caveat have been duly filed, and the truth thereof sustained by affidavit of the party, the same, together with all the

papers connected with the application, shall be transmitted to the Judge of the Land Office, to be heard and determined according to law.

14th. Should it be found necessary to issue instructions concerning proclamation or escheat warrants, or further instructions touching any of the above subjects, the same will be duly attended to.

HOKE SMITH,
Secretary.

ALASKA LANDS—SCHOOL RESERVATION.

INSTRUCTIONS.

A reservation of land for public school purposes in Alaska may be properly made by the government.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (G. C. R.)

On the 12th ultimo, I transmitted to your office two communications from the Commissioner of Education, dated December 2, 1893, calling attention to two applications made to your office—the first by M. J. Sloss, of San Francisco, California, for a certain tract of land in Kadiak, Alaska, embraced in survey No. 111, and the second made by the Alaska Oil and Guano Company, for a certain tract of land embraced in survey No. 5 of Alaskan surveys.

Mr. Sloss's application was made under the act of March 3, 1891 (26 Stat., 1095), making provisions for entries in section 11 *et seq.* of said act, for townsite, trade and manufacturing purposes.

It appears that in the years 1889 and 1890, the General Agent of Education in Alaska, under direction of the Commissioner of Education and with the approval of the Secretary of the Interior, erected a public school house and teacher's residence at Kadiak; the land all belonging to the government, no metes and bounds were established.

It appears that Mr. Sloss's claim has been surveyed, and the Commissioner of Education in his communication relative thereto states:

As his claim is surveyed so close to the government school building as to deprive it of suitable play ground, I have the honor to suggest that before title to said claim is issued to said Sloss, that the following tract of land (the plat of which is attached to this letter) be reserved and set aside for public school grounds—to wit: Beginning at southwest corner of school building and running south $41^{\circ} 15'$ west 50 feet; thence south $48^{\circ} 45'$ east 50 feet; thence north $41^{\circ} 15'$ east 275 feet, or $4\frac{1}{8}$ chains; thence north $48^{\circ} 45'$ west 396 feet, or 6 chains; thence south $41^{\circ} 15'$ west 275 feet, or $4\frac{1}{8}$ chains; thence south $48^{\circ} 45'$ east 346 feet.

The second communication, under the same date, asks for the reservation of about one and one-half acres around the school house and teacher's residence, erected in the year 1887, on the same authority, in the village of Killisnoo, on Kenasnow island, Alaska.

The "Alaska Oil and Guano Company," of Killisnoo, Alaska, has made an application (survey No. 5) for certain lands, and the Commis-

sioner of Education states that the application of said company "embraces all the land around the government school building, with the exception of $\frac{3}{10}$ of an acre, upon which the school buildings stand;" that this area is less than sixty-three feet square, and barely large enough for a good building, without any provision for necessary play ground. He asks that there be reserved and set aside for public school grounds the following in said last named village, to wit:

Beginning at corner number one of plat and running south $62^{\circ} 00'$ west 100 feet; thence north $45^{\circ} 35'$ west 419 $\frac{4}{5}$ feet; thence north $62^{\circ} 00'$ east 226 $\frac{7}{10}$ feet; thence south $28^{\circ} 00'$ east 400 feet to place of beginning.

Plats of the grounds desired accompany both applications.

In my said communication to your office of the 12th ultimo, I requested a report from your office "as to the character of the claims above referred to, date of application, area of each claim, together with reasons, if any, why the reservations should not be made."

I am now in receipt of your office letter ("E") of the 10th instant, making the report called for, and giving your reasons for concurring in the suggestion of the Commissioner of Education, that the reservation be made.

It is unnecessary to again set out the statutes and circulars, cited by you, implying that the government is authorized to make and establish reservations for public school purposes. In addition to the apparent intendment of those statutes, it is sufficient to say that when the school houses and teacher's residence were built upon these lands, a reservation of adequate grounds surrounding the same was certainly contemplated, and the same should not be trenched upon by other claims. The amount of land in both cases is small enough, and should be eliminated from the respective claims.

Concurring in your office recommendation to that end, let the reservations asked for be made.

Under date of December 14, 1893, the Commissioner of the Bureau of Education requested that a certain tract of land, situated on the proposed site (survey No. 4 $\frac{1}{2}$ General Land Office) for the village of Unalaska, on the Unalaska island, Alaska, be set aside as a reservation for the government schools, to wit:

Beginning at a point on high water line of the townsite of Unalaska, as surveyed in 1892 by Francis Tagliabue, U. S. D. S., where the northerly line of the first street (not named on plat) southeast and parallel with South street, if extended will intersect said high water line; thence southwesterly along the northerly line of said street to the easterly line of the first street (not named on plat) southwest and parallel with Iliuliuk street, being 693 feet more or less; thence northwesterly along the easterly line of said street 200 yards; thence northeasterly at right angle with last course and parallel with south street to the high water line, being 561 feet more or less; thence southeasterly along said line to place of beginning.

A map of this school tract, prepared by your office, accompanies said letter. I see no reason why the same should not be reserved, and it is so directed, when the townsite entry shall be made.

CHIPPEWA HALF BREED SCRIP—LOCATION.

UNITED STATES *v.* NORTHERN PACIFIC R. R. CO.

The seventh clause of article 2, of the treaty of September 30, 1854, did not authorize the issuance of scrip to the Chippewa half breeds, and the location of such unauthorized scrip on unsurveyed land would not operate to defeat a railroad grant on the subsequent definite location thereof.

The confirmatory act of June 8, 1872, does not ratify or confirm a location of such character as against a prior appropriation of the land under a railroad grant.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (J. I. P.)

By letter "F" of August 18, 1893, your office informed this Department that, by letter of July 28, 1893, a rule was laid upon the Northern Pacific Railroad Company to show cause, within thirty days, why proceedings should not be instituted, under the act of March 3, 1887 (24 Stat., 556), to restore to the United States the title to lots 2, 3 and 4, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 9, and all of Sec. 5, in fractional T. 133 N., R. 28 W., St. Cloud land district, Minnesota, and with said letter of August 18, is transmitted a copy of the letter of July 28, *supra*, and the answer of the railroad company thereto.

Subsequently your office recommended the dismissal of the rule as to the W. $\frac{1}{2}$ of Sec. 5, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 9, T. 133 N., R. 28 W., for the reason that said tracts were inadvertently included in said rule and were not included in the scrip locations referred to in said letter of July 28, *supra*.

On September 28, and 29, 1870, locations were made on the lands described in said township 133—save those tracts excepted from the rule—of Chippewa half-breed scrip, issued under the seventh clause, second article, of the treaty of September 30, 1854, between the United States and Chippewa Indians of Lake Superior and the Mississippi (10 Stat., 1109). The map of general route of the Northern Pacific Railroad Company filed in the district land office August 13, 1870, prior to these locations, did not show said township 133 to be within the primary (twenty-miles) limits of the grant to said company. The map of amended general route filed October 2, 1870, and the map of definite location filed November 12, 1871, each included said township in the primary limits of said grant.

The survey of said township was made October 20, to 24, and the approved plat thereof was filed December 8, 1871, and these scrip locations were attempted to be adjusted to that survey September 22, 1873, by the local officers, as shown in their regular returns for that month.

June 20, 1873, all of these tracts, viz., all of Sec. 5; lots 2, 3 and 4; the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 9, were listed for the purposes of the Northern Pacific Railroad grant, and were patented to that company November 4, 1873.

Because of the facts above set forth, your office is of the opinion that said tracts covered by said scrip location were erroneously conveyed to the Northern Pacific Railroad Company for the purposes of said grant and that it is the duty of this Department, under the act of March 3, 1887 (24 Stat., 556), to institute proceedings to recover title to said lands.

The contention of the railroad company is, that these scrip locations were null and void because made upon unsurveyed land, and it declines to surrender its patents to said lands for the reasons that since receiving said patents it has sold, conveyed and transferred said lands to other parties.

The seventh clause of Article II, of the treaty of September 30, 1854 (10 Stat., 1109), is as follows:

Each head of a family or single person over twenty-one years of age, at the present time, of the mixed bloods belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form.

At the threshold of this case we are confronted with the query of where is the authority for the issuance of this scrip. If it does not exist in the clause of the treaty quoted, it does not exist at all.

On February 23, 1856, his attention having been directed thereto, the Hon. Thomas A. Hendricks, then Commissioner of the General Land Office, by his letter of that date to the Secretary of the Interior, declared that there was no provision in said treaty for the issuance of scrip or land certificates. The then Commissioner of Indian Affairs differed from him, and urged the issuance of certificates of identification to those mixed-bloods entitled to land under said treaty. This suggestion was accepted by the Secretary of the Interior, and a form of certificate, to be used for the purpose of identification only, was adopted, which on its face was declared to be non-assignable, and that its possession by an assignee would not be recognized by the government.

On June 9, 1865, because of gross abuse and frauds that had arisen under the construction of said treaty by Secretary Usher in 1863, extending its benefits to a large class not theretofore regarded as included therein, Secretary Harlan decided that said treaty did not authorize the issuance of scrip.

October 28, 1867, Secretary O. H. Browning concurred in that opinion, and confirmed it, but permitted the issuance of certificates of identifications to continue.

August 11, 1869, the Department decided that no more scrip would be issued, but that selections of land by those entitled thereto must be made in person.

March 8, 1872, Hon. F. A. Walker, Commissioner of Indian Affairs, in a letter to the Secretary of the Interior of that date, gave it as his opinion that said treaty did not authorize the issuance of scrip. Again,

on March 19, 1872, Secretary Delano, in an exhaustive opinion, in which he reviewed the history of the doings of the Department with reference to the Chippewa Half Breeds under said treaty, says—

The construction of this clause (the one in question) is manifest. . . . Its object was to secure to the persons therein described *land*, and it makes no provisions for giving them any thing else.

It will be seen that the heads of this Department, except Secretary Usher, and all the Commissioners of the General Land Office to whose attention this matter has been brought in such a way as to require an expression of opinion thereon, have with striking unanimity decided that the clause of said treaty in question, does not provide for the issuance of scrip, that it provides for giving the mixed bloods land and nothing else.

In these opinions I concur. If, then, the clause of the treaty mentioned, does not provide for the issuance of scrip, that which has been issued is without authority of law.

Because of the evils that arose under the liberal construction of said clause by Secretary Usher, above mentioned, a commission was appointed by the Secretary of the Interior, in 1871, to ascertain who were entitled to the benefits of said clause, and on the showing made by that commission, Secretary Delano, on March 19, 1872, in the decision referred to above, declared that all the scrip issued under said clause, except that designated as "Gilbert scrip," issued to 278 persons, in 1856, for the purposes of identification, was fraudulent, and that all entries made with said scrip and unpatented should be canceled. (Report of Commission on Half Breed Scrip, p. 316.) The scrip in question was not "Gilbert scrip."

Here we have lands located with scrip issued without authority of law, declared by the Secretary of the Interior fraudulent and void, and all entries or locations made thereunder directed to be canceled.

Now the question arises, did the so-called confirmatory act of June 8, 1872 (17 Stat., 340), so ratify or confirm the location of the lands in question, made with unauthorized scrip, as to except said lands from the operation of the grant to the railroad company. The provisions of said act are as follows:

That the Secretary of the Interior be and is hereby authorized to permit the purchase with cash or military bounty land warrants of such lands as may have been located with claims arising under the seventh clause of the second article of the treaty of September thirtieth, eighteen hundred and fifty-four, at such price per acre as the Secretary of the Interior shall deem equitable and proper, but not a less price than one dollar and twenty-five cents per acre, and that owners and holders of such claims in good faith be also permitted to complete their entries and to perfect their titles, under such claims, upon compliance with the terms above mentioned: *Provided*, That it shall be shown to the satisfaction of the Secretary of the Interior that said claims are held by innocent parties in good faith, and that the locations made under such claims have been made in good faith and by innocent holders of the same.

In considering this question it is to be borne in mind always that "it

will not be supposed that Congress intended to authorize a sale of land which it had previously disposed of" (*Beecher v. Wetherby*, 95 U. S., 517-527); also

that whenever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it (*Wilcox v. Jackson*, 13 Pet., 498).

The location of this unauthorized scrip on the lands in question was of no force, and cut no figure as against the rights of the railroad company which attached to said lands at the date of filing the map of definite location, and was afterwards perfected by the issuance of patent as stated.

At the time the act of June 8, 1872, *supra*, was passed, therefore, the lands in question had already been appropriated and severed from the public domain, and applying the rules quoted above, it is evident that the provisions of the act of June 8, *supra*, were not intended by Congress to apply to the lands in question.

Again, it is well established that locations or filings on unsurveyed lands are void. (38 Fed. Rep., 1; 100 U. S., 117.) The scrip locations in question were so made.

Under said act another commission was appointed by the Secretary of the Interior to ascertain who of those claiming were entitled to purchase under it. Among those so entitled, as set out in the majority report of said commission, from which the minority does not dissent, is the Lake Superior and Puget Sound Company, a corporation and the holder of the scrip under which the locations in question were made. (See Report of Commission on Half Breed Scrip, Chippewas of Lake Superior, p. 283.) The argument of the commission, parenthetically speaking, in which it endeavors to show said company to be a *bona fide* holder of said scrip in spite of the positive inhibition against its assignment on its face, while ingenious and plausible, does not avoid the force of that inhibition.

June 16, 1873, this Department, in a letter addressed to the Commissioner of the General Land Office upon this subject, and referring to the report of said commission, says—

Therefore the parties in whose favor the Commissioners have reported "as innocent purchasers in good faith" will be and are hereby authorized to purchase the tracts embraced in Schedule "A" accompanying the report of the majority of the commission, on payment of \$1.25 per acre for lands lying within the indemnity limits or outside of all railroad limits, and \$2.50 per acre for the lands embraced within the granted limits of the railroads.

The entries of the land will be made at the proper U. S. Land Office in usual form and notice of this decision will be given to the claimants or their attorneys by letter immediately and they should be requested to perfect their entries and make payment therefor within sixty days after such notice has been given, in all cases where the land has been surveyed.

In cases where the lands have not been surveyed, the parties will be required to perfect their entries and make payment within thirty days after surveys are made and plats of surveys filed in the local land office.

These lands will be restored to market as soon as parties have failed to comply with this order.

(Record 11 of Letters sent Indian Commissioner, page 421-422.)

Because of the action taken by your office in this matter, the Department is warranted in the assumption that the Lake Superior and Puget Sound Company, the holder of the claims in question at the date of the confirmatory act of June 8, 1872, never perfected its entry of the tracts in question required by the departmental decision of June 16, 1873; otherwise, if said claims were perfected and patent has issued thereon, the jurisdiction of this Department is at an end, and this controversy as to who is entitled to these lands should be decided by the proper judicial tribunal. Having never purchased, as required, the right of said corporation to do so, under said order of June 16, 1873, ended long ago, presumably before these lands were patented to the railroad company November 4, 1873.

I am aware that the arguments produced herein and the conclusion reached, are contrary to the decision of this Department of February 13, 1874, holding that these locations were confirmed by the act of June 8, 1872, *supra*.

But this is purely a question of law, and of the ability of the government to sustain itself thereon in the courts, and for the reasons herein stated, I do not feel warranted in recommending the taking of steps looking to the institution of proceedings by the government to recover the title to these lands.

TIMBER CULTURE CONTEST—DECEASED ENTRYMAN.

RODEN *v.* WARNER.

In proceedings against the timber culture entry of a deceased claimant no jurisdiction is acquired where the claimant is made the sole party defendant.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 22, 1894. (E. M. R.)

The land involved is the NW. $\frac{1}{4}$ of Sec. 25, T. 116, R. 59 and the SW. $\frac{1}{4}$ of Sec. 24, T. 116, R. 59, Watertown land district, South Dakota.

The record shows that Arthur D. Warner and Edward B. Warner made timber culture entries respectively for the above described tracts on July 18, 1881. July 29, 1890, John J. Roden filed in the local office his corroborated affidavits of contests against both of the said entries alleging that the claimants had failed to comply with the requirements of the timber culture law in that they had failed to cultivate or caused

to be cultivated trees of any kind on their entries since the filing of their entries and that up to the date of filing the contests in these causes, the entrymen above mentioned had failed to comply with the law incident to and covering timber culture entries.

Notices of hearing were served by publication, the defendants not being citizens of the State. The service shows, that the first day of publication of notices was made on September 4, 1890, and on the same day copies were mailed to the defendants.

April 13, 1891, the register and receiver rendered their joint opinion wherein they dismissed the contest in each case and sustained the claimants.

Upon appeal your office decision of April 20, 1892, sustained the ruling of the register and receiver as to John J. Roden *v.* Arthur D. Warner and held the service in the case of John J. Roden *v.* Edward B. Warner to be defective inasmuch as the said Edward B. Warner was dead at the time of the initiation of the contest against his entry and there was no service on his heir.

June 21, 1892, John J. Roden appealed alleging the decision to be contrary to the law and the evidence. July 17, 1893, Roden dismissed his contest as to Arthur D. Warner, with the consent of his attorney, leaving for consideration here his contest against Edward B. Warner.

At the trial before the local office the following agreement was entered into:

It is hereby further agreed between the parties to this contest brought by John J. Roden against Arthur D. Warner, involving the NW $\frac{1}{4}$ of Sec. 25, T. 115, R. 59 and the contest brought by John J. Roden against Edward B. Warner, now deceased, and his legal representatives and involving the SW $\frac{1}{4}$ of Sec. 24, T. 116, R. 59, shall be submitted upon the above and foregoing testimony and that the decision rendered upon the same shall be final and conclusive as to both of the above mentioned contests, with the understanding with the right of appeal.

The record shows that Edward B. Warner died on March 6, 1890, and that on March 20, 1890, Eugene R. Warner was appointed administrator of his estate.

It is shown further by the record that John J. Roden knew of the death of Edward B. Warner prior to the hearing before the local officers. The copy of the notice for publication shows that it was to Edward B. Warner.

There is no evidence of service on his heirs nor is there anything to show who they were. The agreement between the attorneys quoted above where the following is contained "and the contest of John J. Roden against Edward B. Warner now deceased and his legal representatives" does not authorize the belief that they were—if there be any such—properly made parties.

In *Bone v. Dickerson's Heirs* (8 L. D., 452), it is said (syllabus):—

In contesting the claim of a deceased entryman due diligence should be exercised to ascertain the names and last known addresses of the heirs or legal representatives

of the decedent, and, if ascertained, the notice should be to them by name, and served personally if possible.

and again on page 455—

The only cases where the statute uses the words, "administrator" and "executor," and expressly clothes them as such with any power or authority in reference to the unconsummated claim of a deceased claimant, are that of a pre-emptor dying before "filing in due time all the papers essential to the establishment" of his claim, and that of a homestead entry, where both parents are dead leaving an infant child or children, and in both of these cases, it is expressly provided, that the title by patent shall be made and enure to others than the administrator or executor. (Secs. 2269 and 2292, R. S.) The vesting of the legal title to realty in an administrator or executor would seem to be an anomaly in the law and without any sound basis in reason. At common law, an administrator takes no interest in the real estate of the deceased; nor does an executor unless by force of the provisions of the will. Lands not being liable at common law for the payment of debts, they are made liable by statute if there be a deficiency of personal estate, and where so made liable, the authority of the administrator or executor derived from the statute is a "naked authority to sell on license," and they are not thereby vested with the title. Williams on Executors (Vol. I., p. 717, note d.). But section four (above quoted) of the timber-culture act expressly exempts the land from liability for the debts of the entryman in a case like the present and the will gives the executor no interest in the realty or personality of the testator. To direct the title by patent to issue to an administrator or executor under such circumstances, would be the requirement of an act, wholly useless and contrary to all the analogies of the law in similar cases. This Congress cannot be held to have intended.

Personal service of notice upon the father, William L. Dickerson, the executor nominated in the will and who (as before stated) but for the will would have inherited the property of the entryman as his heir, was not sufficient. Having been displaced as heir by the will, he was no longer the heir of the entryman within the meaning and spirit of the statute.

In *Cox v. Wheeler* (13 L. D., 60), it was held that the Department acquires no jurisdiction through an appeal taken on behalf of a deceased timber-culture entryman; if such action is not authorized by the heirs or legal representatives of the decedent.

In *Dixon v. Bell* (12 L. D., 510), the syllabus is as follows:

In case of contest against the entry of a deceased homesteader service of notice should be made upon the heirs and legal representatives.

The case of *Wharton v. Hinds* (10 L. D., 152), is directly in point. There it was laid down that "a contest against the entry of a deceased timber-culture entryman, wherein the decedent is made the sole party defendant is a nullity and must be dismissed."

There are other authorities upon the question now at bar, but those cited are sufficient to show, under the facts in this case, that proper service has not been made on the heirs of Edward B. Warner. The passage quoted from the agreement, is more a conclusion of law than such a statement of fact as would justify this Department in acting upon the case.

Your office decision is, therefore, affirmed, as the case of *Roden v. Edward B. Warner* was never properly initiated and therefore no jurisdiction over his heirs was ever acquired.

CONFLICTING SETTLEMENT RIGHTS—APPORTIONMENT.

JARVIS *v.* WASH.

In case of conflicting settlement rights, arising through a mistake as to the exact location of a boundary line, an equitable apportionment of a tract may be made so as to give each party his improvements, though one of them settled after survey.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (F. W. C.)

I have considered the case the case of Frank Jarvis *v.* Wm. M. J. Wash, involving the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 31, T. 1 N., R. 5 E., Oregon City land district, Oregon, on appeal by both parties from your office decision of June 30, 1892, holding that the entry by Wash should be canceled as to the tract in question, and that Jarvis should be permitted to make entry therefor

"provided that before submitting his final proof he will file an agreement that after receiving final certificate he will convey to Wash the portion thereof on which the latter's improvements are situated not exceeding five acres."

This land was formerly included in the grant made to aid in the construction of the Northern Pacific Railroad but being opposite unconstructed road, was forfeited and restored to the public domain by the act of Congress approved September 29, 1890 (26 Stat., 496).

On March 14, 1891, Wash made homestead entry No. 9,686 for the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 31, T. 1 N., R. 5 E., and on May 20, 1891, Jarvis initiated a contest against said entry, alleging, in effect, a prior adverse right to the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said section 31.

The case was regularly heard in October following, and on November 9, 1891, the local officers recommended the dismissal of the contest.

On November 30, 1891, Jarvis filed a motion for re-hearing which was denied by the local officers, and he, therefore, appealed to your office.

Your office decision, before referred to, applies the spirit of the provision of Sec. 2274, R. S., in the matter of allowing a joint entry, by permitting Jarvis to make entry of this land, after agreeing to convey to Wash the portion of the subdivision upon which he has improvements, not to exceed five acres.

The subdivisional survey of this section was made in the fall of 1881, the same having been approved by the surveyor-general on December 30, 1881, and the plat was filed in the local office April 14, 1882.

The facts relative to the claim of these parties are as follows:

Wash was the prior settler, but prior to his settlement, his step-son, one Larkin Russell, had settled in the vicinity of this land and claimed the tract in question under license or agreement with the Northern Pacific Railroad Company.

Wash admits that after making settlement he applied to the company to purchase the three forty-acre tracts covered by his entry in the NE. $\frac{1}{4}$, but did not apply for the tract in question.

At the time Wash made settlement, the land had not been surveyed and the only guide as to the location of the eastern boundary of the NE. $\frac{1}{4}$ seems to have been a random line, which, by the official survey, was shown to be about one hundred and twenty-five feet short of the true line.

Judged from the random line, Wash built his house and did his clearing and cultivation on the NE. $\frac{1}{4}$, but, under the official survey, his house and about two and a half acres of his clearing falls upon the quarter in question.

Russell made slight improvements upon the land in question but never resided thereon, his home being upon section 30.

He sold to one Crosier, who in turn sold to one Oburst, who, after living upon and improving the land for a couple of years sold to Jarvis, the present claimant, in 1886, the consideration, including some live stock, being \$650.

After his purchase Jarvis resided continuously upon the land, until arrested in July, 1889, from which time he was confined in the jail and penitentiary until liberated by the supreme court in May, 1891, when he returned at once to the land and, learning of Wash's entry, instituted the contest under consideration.

Wash well knew of the adverse claim of Oburst and Jarvis and of the several transfers and sales made of this land.

He attempts to show that he always claimed this land but the preponderance of the testimony shows that his claim to this land did not antedate Jarvis's settlement, and if it did, that his silence, under circumstances calling for action, misled Jarvis into expending about \$1,000 on the purchase of the prior claim and the improvements of this land. It is true that after the official survey he must have known that his improvements were on the land in question, but when Jarvis bargained with Oburst for the purchase of his possessory right to the land in question, Russell and Wash were present and no act on Wash's part was calculated to apprise Jarvis of his adverse claim; on the contrary, he warmly welcomed Jarvis to the neighborhood.

I am clearly of the opinion that Wash, in placing his improvements upon this land, acted upon a mistaken idea as to the exact location of the eastern boundary of the NE. $\frac{1}{4}$ of the section, but that he should be secured to the extent of the land improved by him, if possible, as he would suffer a great loss to be required to move and lose his clearing. On the other hand, I do not think the fact that Wash was the prior settler, and that by accident more than design or purpose his improvements fall partly on the tract in question, sufficient, under the circumstances, to award him the full tract in question, and Jarvis be thus deprived of his home and improvements.

Jarvis filed an acceptance of the terms of your decision with his appeal, conditioned upon Wash's acceptance, which was never filed.

As Jarvis settled after survey, technically, a joint entry cannot be allowed, but it seems to be a case calling for an equitable apportionment of the land so as to retain intact the improvements of both parties.

The improvements by Wash do not cover exceeding five acres of the land in question, and I am of the opinion that your decision should be sustained, and is hereby affirmed, upon the theory that thereby an equitable apportionment will be made, and the interests of all parties protected. *Williams v. United States* (138 U. S., 514-524).

RES JUDICATA—HEARING—SECTION 7, ACT OF MARCH 3, 1891.

ELLIFSON *v.* PHILLIPS ET AL.

Where a case is returned to the General Land Office for adjudication under section 7, act of March 3, 1891, and an appeal is taken from the Commissioner's action therein, the Department will not order a hearing on an issue involved in its former consideration of the case.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (W. F. M.)

On September 12, 1885, Norman F. Phillips made pre-emption cash entry of the NE. $\frac{1}{4}$ of section 6, township 104 N., range 46 W., within the land district of Marshall, Minnesota.

On November 14, 1887, Phillips sold the land to J. M. Poorbaugh, and on March 29, 1889, Sampson E. Ellifson instituted a contest against the entry.

After hearing, the register and receiver recommended that the contest be dismissed, but on appeal to your office the entry was found to be fraudulent, and held for cancellation. Pending appeal from your office decision to this Department, the remedial legislation embodied in the act of Congress of March 3, 1891, was passed.

It appearing that the land was sold prior to the first day of March, 1888, and after final entry, and that there was no adverse claim which originated prior to the date of final entry, on March 30, 1891, Poorbaugh executed his affidavit setting forth his purchase of the land from Phillips, alleging his good faith in the premises, and asking the confirmation of his title under the act of March 3, 1891.

On May 7, 1891, Ellifson, through counsel, filed in this Department an answer to Poorbaugh's application, denying that the latter was a purchaser in good faith and charging that he bought from Phillips with his eyes open and with knowledge of all facts which rendered the entry illegal. An answer supplemental to this was filed on June 1, 1891, reiterating the charge of want of good faith on the part of Poorbaugh, accompanied and supported by the affidavit of two persons to the gen-

eral effect that Poorbaugh was in such a situation as necessarily to imply knowledge of Phillips's fraud.

The case being in this attitude, a decision was rendered by this Department on February 26, 1892, the material part of which is quoted, as follows:

No fraud has been found on the part of the purchaser, and no adverse claim originating before the final entry exists. It follows that if the purchaser has not been guilty of fraud, section 7 of the act above cited provides for the issuance of a patent on the entry in question.

You are therefore directed to require the transferee to furnish proof, as required by the letter of instructions to chiefs of divisions, dated May 8, 1891, 12 L. D., 450.

After receiving this proof, you will adjudicate the case in the light of the act and instructions above cited.

The decision does not in terms pass upon the charge imputing bad faith to Poorbaugh and takes no express notice of the affidavits to that effect.

In response to instructions issued out of your office to the register and receiver, Poorbaugh furnished the proofs called for, consisting of a certified abstract showing chain of title back to the entryman, together with satisfactory proof that the land had not been reconveyed to the entryman, the original deed having been already filed.

Finding this showing to be sufficient, the decision of your office, now before me on appeal, holds that the entry should be confirmed and patented.

The specifications of error are as follows:

1. In holding that the evidence furnished on August 13, 1892, was sufficient to meet the requirements of the Secretary's decision which held, inferentially, that the evidence theretofore filed, under the motion to confirm, was not sufficient to entitle the alleged transferee to the relief prayed for.

2. In not holding that the evidence filed August 13, 1892, was substantially the same that had been filed in the Secretary's office and held insufficient by the Secretary.

3. In holding that the evidence produced in support of the motion to confirm is sufficient to bring the entry here involved within the confirmatory provisions of section 7 of the act of March 3, 1891.

4. In failing to find that the alleged purchaser of the land from Phillips had notice of the fraudulent character of the entry here involved.

It is to be observed that the appeal does not ask for, nor does it contain any suggestion of a hearing for the purpose of enquiring into the good faith of the transferee, Poorbaugh; but since the case has been pending here, the appellant, Ellifson, has filed an affidavit making further charges of fraud against Poorbaugh, and requesting that the case be remanded to the local office for an investigation.

As heretofore stated, though the departmental decision of February 26, 1892, takes no notice of the fact, it is nevertheless true that when

the decision was rendered, there were in the record charges that Poorbaugh was not a bona fide purchaser. The Department had before it at that time the same allegations of fraud, in substantially similar terms, that are now relied on and presented as grounds for ordering a hearing. The issue at such a hearing, if ordered would not materially differ from at least one of those impliedly passed on and finally determined by that decision.

No motion for review was filed, the decision has become a final judgment, and there is no escape from the conclusion that all the matters and things in issue therein have now assumed the character of the thing adjudged.

The decision of your office is, therefore, affirmed.

RELINQUISHMENT—DEATH OF ENTRYMAN. .

ROBERTSON v. MESSENT'S HEIRS ET AL.

A relinquishment executed by the entryman and given to another to file constitutes a special agency that expires with the death of the principal; and a relinquishment in such a case, if filed, should be rejected by the local office where the fact of the entryman's death is previously made known.

Secretary Smith to the Commissioner of the General Land Office, March 31
(J. I. H.) 1894. (A. E.)

The record of this cause shows that on March 6, 1886, Mary Messent made desert land declaration for the SE $\frac{1}{4}$ of Sec. 26, T. 25 S., R. 25 E., Visalia, California.

On June 12, 1891, Emil Chauvin filed a contest against the entry, and the same was held until the determination of a prior application to contest made by William M. Robertson.

Robertson's contest was dismissed, August 20, 1891, without a hearing, and no appeal taken. This disposition of the contest was afterwards affirmed by the Commissioner, January 12, 1892.

On October 7, 1891, Andrew Robertson filed a contest against and applied to make homestead entry of the land in controversy, and his application was rejected because of Messent's entry of record, although the time for her to have proved her reclamation of the land had expired more than two years before. From this rejection Robertson appealed.

By your office letter of January 12, 1892, the rejection of Andrew Robertson's application was affirmed, but no action was taken on his contest.

From this decision Andrew Robertson appealed to this Department, on March 20, 1892, and that appeal is now before it.

By the same letter which rejected the application of Andrew Robertson, your office closed the case against the contest of William M. Robertson, he not having appealed from the decision of the local office.

This removed the obstacle to the contest of Emil Chauvin, and the hearing in *Chauvin v. Messent* was set for April 30, 1892.

On April 27, 1892, at 11:30 A. M. o'clock, Andrew Robertson filed a new application to enter said land, attached to which were several affidavits, which appear to have been considered as initiating a new contest. This application was presumed rejected.

At 2:20 P. M. o'clock of April 27, 1892, Susan L. Bowden filed a relinquishment of the entry of Mary Messent, together with an application to make homestead entry of the land. This relinquishment was dated October 19, 1888, and sworn to before a notary.

The relinquishment was placed of record, and ten minutes after Emil Chauvin filed a withdrawal of his contest, and the application of Bowden was then allowed. At 3:45 P. M. o'clock the same day, Robertson again presented his application to make entry. It was rejected because of Bowden's entry.

On June 3, 1892, Robertson appealed from this rejection of his application.

On July 26, 1892, your office rendered a decision on this latter appeal, while the appeal from the rejection of Robertson's first application and contest was pending unacted upon. In that decision your office passes upon the question involved in the appeal from the decision of January 12, 1892, although that question had been removed by the appeal from your office jurisdiction. It is true the circumstances had changed at the time your office considered Robertson's second appeal, but that did not warrant a decision on a question which the appeal to this Department took beyond your office jurisdiction, and which could only be decided by this Department. A consideration of your office decision thereon, however, does not show that any injustice was done or right denied to Robertson, in so far as it relates to that appeal.

By your office decision of July 26, 1892, on Robertson's second appeal, the entry of Messent is re-instated, that of Bowden cancelled, and Robertson allowed to proceed with his contest, after amending the same so as to include the heirs of Messent in the pleading, her death being suggested by the record.

From this decision Bowden has appealed to this Department.

The records of the land office show that on February 20, 1884, Emil Chauvin made desert land declaration for the whole of section 34, township 25 south, range 25 east, Visalia, California, and that on October 4, 1887, the same was canceled by your office letter "C" for non-compliance with the law; that on March 17, 1892, on the same paper with the relinquishment of Mary Messent, filed by Susan L. Bowden on April 27, 1892, as heretofore set forth, Chauvin subscribed and swore to an affidavit, in which he stated that he knew Mary Messent in her lifetime, and that she made her relinquishment before her death; that at the time she executed said relinquishment, she gave the receiver's receipt, issued by the receiver of the local office, to affiant for safe keeping, and

that affiant lost the same and believed it was destroyed in a fire which burned affiant's residence. As this relinquishment was dated October 19, 1888, and Chauvin filed contest against the entry of Messent on June 12, 1891, he knew when he filed his contest that Messent had executed a relinquishment of the land. The inference is that Chauvin had this relinquishment at the time he filed his contest, but knowing he had exhausted his own rights, and could not take the land, he instituted the contest to keep others from attaching any claim, until he could sell the relinquishment. This inference is sustained by the affidavit of Arthur Bulock, attached to the homestead application of Andrew Robertson, offered and rejected April 27, 1892.

In this affidavit Bulock swears that Emil Chauvin, on April 25, 1892, offered to sell him the abandonment of the land in controversy for the sum of \$650, Chauvin saying he had the abandonment in his possession.

As Bowden filed this relinquishment two days after and Chauvin ten minutes afterwards withdrew his contest, the logical inference is that Bowden bought the relinquishment, or used it for Chauvin's ultimate benefit.

As Robertson alleges in his affidavit that he is creditably informed of Messent's death, in May, 1889, at Delano, California, and Chauvin in his affidavit admits that she is dead, the effect of the relinquishment expired with her death. Therefore it was improper for the local office to have accepted this instrument as releasing the land from Messent's claim, while these allegations of her death were before it.

A relinquishment not being effective as releasing the claim of the person executing it until it is filed, the giving it to another to file constitutes a special agency, which agency expires with the death of the principal; therefore, there being allegations, under oath, on file in the local office showing the death of Messent, the author of the relinquishment, it should have been rejected as being void and not effective to release the land from her claim.

You will therefore reject the relinquishment of Messent and revive her entry, rejecting and expunging from the record that of Bowden. Chauvin having withdrawn his contest, you will allow that of Robertson to proceed against the heirs. If they can not be personally found, notice by publication for sixty days must be given of the time, place, parties and cause of contest.

HOMESTEAD RIGHT—MARRIED WOMAN.

FLORIDA CENTRAL AND PENINSULAR RY. CO. *v.* CAMPBELL.

A married woman can assert no right under the homestead law to a tract of land through a former husband who made no formal claim under said law.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (F. W. C.)

I have considered the appeal by the Florida Central and Peninsular Railway Company, from your office decision of October 12, 1892, holding for cancellation its selection of the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 24, T. 15 S., R. 22 E., Gainesville land district, Florida.

This tract was selected by the company on March 29, 1882, under the act of June 22, 1874 (18 Stat., 194).

On December 26, 1891, Easter Campbell applied to make homestead entry of this land which was rejected on account of the pending selection by the company and she appealed.

In support of her application she alleged that she settled upon the land in question with her former husband, one Samuel Smith, in 1880; that they lived together thereon until his death in 1887, and that she and the children continued to live thereon for about one year thereafter.

Upon this showing your office letter of February 29, 1892, ordered a hearing to determine the status of the land at the date of the company's selection.

The company filed a motion for the review of that action, calling attention to the disqualification of the applicant, who was shown to have been a married woman at the date of making her application, she having since the death of Smith married one Campbell.

This was overruled by your office letter of March 10, 1892, and the hearing was proceeded with.

The local officers found this land was appropriated by Smith at the date of the company's selection and that the same should therefore be canceled. This action was sustained by your office decision of October 12, 1892, and the company's selection was held for cancellation.

An appeal brings the case before this Department.

The record sustains the showing originally made in support of claimant's application. From affidavits made after the closing of the taking of testimony, and before another officer than the one designated, it appears that Smith settled upon this land as a homestead, and that he was in ignorance of what was necessary to be done to secure him in his rights.

This case originated upon Easter Campbell's application to make homestead entry of the land in question.

To accept such application the company's selection must first be

canceled, but her application may be disposed of without consideration of the company's selection.

At the time she applied she was and is now, as far as shown by the record, a married woman and as such is disqualified from making entry under the homestead laws.

Her former husband, Samuel Smith, made no formal claim to this land, and she cannot since her marriage set up a claim in his name to her benefit. Whether his children have any rights in the premises is not now before me, but it is clear that the present claimant can have no rights in the premises through her former husband.

Her appeal will therefore stand rejected.

As to the company's selection I deem it but necessary to say that so far as the record before me discloses, no such right exists under the occupation of this land by Samuel Smith as would be equivalent to a legal appropriation of this land sufficient to bar the company's selection.

This is without prejudice to any subsequent claim that may be made to this land by any one claiming under or through said Samuel Smith, and it is not intended hereby to in anywise pass upon the legality or regularity of the company's selection of the land in question under said act of June 22, 1874.

Your office decision is therefore reversed.

HOLMAN v. HICKERSON.

Motion for review of departmental decision of August 21, 1893, 17. L. D., 200, denied by Secretary Smith, March 31, 1894.

RAILROAD GRANT-INDIAN OCCUPANCY.

NORTHERN PACIFIC R. R. Co. v. SALSSBOO.

The occupancy of public land by an Indian who has not abandoned the tribal relation, confers no homestead right under the act of July 4, 1884, as against a railroad grant that became effective prior to the passage of said act.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (F. W. C.)

I have considered the appeal of the Northern Pacific Railroad Company from your office decision of November 19, 1886, holding that the showing filed with the homestead application of Justinia Salssboo, covering lots 8 and 9, Sec. 1, T. 20 N., R. 5 E., Washington, makes a *prima facie* case of exceptance from the grant to the Northern Pacific Railroad Company in whose limits this tract is situated.

It appears that the land was first withdrawn on account of said grant upon the filing of its map of general route of its main line of road August 13, 1870; that it is also within the limits of the withdrawal upon the filing of the map of general route of the branch line of said road August 20, 1873, and that it is within the primary limits of said branch line, as shown by the map of definite location filed March 26, 1884.

The application under consideration was filed on April 1, 1886, under the act of July 4, 1884 (23 Stat., 96), of which due notice was given the railroad company and its objections were duly filed May 11 following.

The showing filed in support of said application evidences that the applicant is a member of the Muckleshoot tribe of Indians; that she is a widow over the age of twenty-one years, and the head of a family, and that she has improved and cultivated nine acres of the land applied for, for twenty-one years preceding her application.

As thus presented, the case is in all important particulars similar to that of the Northern Pacific R. R. Co. v. Te Quda (11 L. D., 304), wherein it was held the occupancy of public lands by an Indian who has not abandoned the tribal relation, confers no homestead right under the act of July 4, 1884, as against a railroad grant that became effective prior to the passage of said act.

For the reasons given in said opinion, your office decision holding that a *prima facie* showing has been made of exceptance from the grant is reversed, and the application by Justinia Salssboo will stand rejected.

PRACTICE—TIMBER-LAND.—CORD WOOD.

GOSLING v. MURPHY.

On the withdrawal of an appeal from the local office the General Land Office may properly take jurisdiction of the case, under rule 48 of practice, if the irregularities therein call for such action.

There is no authority under the law for holding a timber land application subject to the submission of final proof by an adverse pre-emption claimant.

A growth of trees that has no merchantable value except for cord wood does not render the land subject to purchase under the act of June 3, 1878.

The right of purchase under said act does not extend to land covered by the occupancy and improvements of a prior *bona fide* claimant under the pre-emption law.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (W. F. M.)

On November 18, 1889, Patrick J. Murphy filed declaratory statement for the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 1, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 2, township 8 N., range 3 W., of the land district of Marysville, California, alleging settlement on November 11, 1889.

On April 17, 1891, William H. Gosling made application to enter the same land under the act of June 3, 1878, and on the same day filed contest against Murphy's pre-emption claim, alleging that the latter had not settled upon and cultivated the land as required by law, and that it was unfit for agricultural purposes and chiefly valuable for timber, and upon these issues the register and receiver ordered a hearing for June 23, 1891, on which day the parties appeared. An adjournment was had to June 24, when Murphy filed a motion to dismiss the contest on the ground of the irregularity of the proceeding, no final proof having been sought to be made. The motion was overruled, and, by agreement of parties, the hearing was postponed to September 7, 1891, and this date was also fixed for the submission of Gosling's final proof, notice of intention to make the same having been filed on June 25, 1891.

Upon the offering of Gosling's final proof on September 7, Murphy protested against its allowance, so that the real issues, regularly raised, upon which the parties finally went to trial, related to the character of the land, as whether timber or agricultural, and to the priority and good faith of Murphy's settlement and improvements, thus curing the irregularity of proceeding rightfully complained of by Murphy in his motion to dismiss.

The register and receiver found, as to the character of the land, that it is "chiefly valuable for timber for fuel," and as to Murphy's claim of priority of right, that "the evidence is unsatisfactory," and recommended that "in view of the circumstances of the case, Gosling's application to purchase be held subject to Murphy's final proof, when the good faith of the pre-emption claimant may be satisfactorily vindicated."

From this anomalous judgment Gosling appealed, but while the appeal was pending in your office, on August 23, 1892, a motion to withdraw the same was filed in the local office, and was received and filed in your office on August 30, 1892.

Accompanying the withdrawal, and filed simultaneously with it, there was a motion by Gosling that his final proof made on September 7, 1891, be accepted, for the reason, as he alleged, that Murphy's filing had expired by limitation on August 18, 1892. At the same time he tendered four hundred dollars in payment for the land.

On account of the irregularities already adverted to, your office felt warranted in taking jurisdiction of the case, notwithstanding the withdrawal of the appeal, under practice rule 48, and I concur in that action. There is no precedent, or warrant of law, for the unique recommendation of the register and receiver, and your office only discharged a plain duty in exercising the extraordinary jurisdiction conferred by the rule.

Gosling has appealed to this Department from the decision of your office, which holds,

1. That under the rulings of the Department Murphy can not be

considered in default by reason of not having submitted his final proof within the time ordinarily required by law, as he would not be required to do so pending this contest.

2. That Gosling's tender of cash in payment for the land, and his motion that his proof be accepted and receipt issued, can not be allowed, for the reason that by the decision of the local office Murphy's filing was left intact, and he still has right to submit his proof.

3. That the local office erred in finding, from the testimony, that the land is more valuable for its timber than for agricultural purposes.

4. That while Murphy's residence and improvements on the land and cultivation thereof seem to have been of rather a doubtful character up to about the last of March, 1891, since that date he appears to have made good compliance with the law, and was so doing prior to the time when Gosling filed his sworn statement and made application for the land, and that his good faith has not been successfully impeached.

The judgment is that Gosling's application and proof be rejected and that Murphy's filing be allowed to stand.

The salient and decisive facts that appear to me to be clearly established, and which, in the light of the evidence, viewed as a whole, can scarcely be disputed, may be summarized within the compass of a few lines.

The land in controversy, though broken and uneven, and by no means fertile, possesses some value for the purposes of agriculture. It is shown, as to part of it, to be well adapted to fruit culture, and there is evidence, submitted by persons farming similar lands in the near vicinity, to the effect that profitable crops of cereals and vegetables may be grown. The whole tract has a certain value as grazing land, and the evidence discloses that the timber land claimant, who is the owner of extensive flocks of sheep, devotes great bodies of land around about the contested tracts, and presumably of similar character, to this purpose, and there is justification for something more than a mere suspicion that the land in controversy is wanted for the same purpose, rather than for its timber.

The growth upon the land is confined for the most part to a scrubby white oak varying in size from six to twenty-six inches in diameter. The witnesses differ widely in their estimates of the extent of this growth, but they all agree that its only merchantable value is for cord wood.

The right to purchase land valuable only for a growth of this character has been considered by the Department, and denied in the case of *Smith v. Gibson* (18 L. D., 249), where that question was directly in issue.

As to the other principal issue of the good faith and compliance with the law on the part of Murphy, I consider it proved that he had, pursuant to his pre-emption filing, established a residence on the land prior to Gosling's application on April 17, 1891, and that he maintained

that residence up to the date of the hearing. His improvements consisted of a house, which he says was habitable, and which he did inhabit, together with four and a half acres of land prepared for cultivation. This is sufficient to indicate good faith.

I find, therefore, that Gosling's application should be disallowed for two reasons, first, that the land is not chiefly valuable for its timber, and therefore not subject to entry under the act of June 3, 1878; and, second, that at the date of the application the land was occupied and inhabited, and had improvements thereon.

The decision of your office is affirmed.

BOMGARDNER *v.* KITTLEMAN.

Motion for rehearing in the case above entitled (see 17 L. D., 207) denied by Secretary Smith, March 31, 1894.

SETTLEMENT RIGHTS—UNSURVEYED LAND.

STEWART *v.* DOLL.

A settlement right acquired in good faith prior to survey will be protected as against a subsequent adverse claim made and maintained with full knowledge of the facts.

Secretary Smith to the Commissioner of the General Land Office, March 31, 1894. (J. I. H.) (A. E.)

The record of this cause shows that on October 6, 1888, the survey of the west half of township 5 south, range 86 west, was filed in the land office at Glenwood Springs, Colorado; that on October 27, 1888, John W. Stewart filed a pre-emption declaratory statement No. 1081, Ute series, for lots 5 and 6, section 5, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and lot 1, section 6, in said township and range. Stewart claimed settlement on August 11, 1882. Lots 5 and 6, Sec. 5, comprise that portion of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ which lies west of Grand River.

On October 30, 1888, Samuel Doll filed his declaratory statement No. 1086, Ute series, for lots 5, 6, 15, 17, 18, and 19, Sec. 5, and lot 8, Sec. 6, same township and range, alleging settlement May 11, 1887. This as to lots 5 and 6 conflicted with the claim of Stewart.

On December 5, 1888, Doll gave notice of his intention to make final proof on January 12, 1889, and on January 9, 1889, Stewart filed a protest and alleged prior settlement. Doll submitted his proof on the day advertised, and a hearing to determine the claims of Stewart was set for March 15, 1889. On this date Stewart filed an amended affidavit, and hearing was begun. After numerous adjournments, the case was finally closed on March 13, 1891, but decision was not rendered until June 17, 1891, more than two years after the hearing was begun.

The local office decided that Doll has a prior right to the ground.

Your office decision changed this, and, though admitting Stewart's prior settlement and his improvements, divide the land between them, because of Doll's alleged improvements.

The testimony in this case comprises over six hundred and fifty pages, and the material facts appear to be as follows:

Stewart settled in May, 1882, in the southern part of a valley, bounded on the east, south and part of the west by Grand River. This was more than five years before survey, and there was no other settler nearer than seven miles. This valley contained in the neighborhood of two hundred acres. Shortly after settling, Stewart bought a herder's cabin, directly north of where he had settled, at the foot of the mountain in the same valley. This cabin stands almost at the intersection of the extreme northwest corner of section 5, with the extreme northeast corner of section 6, and is on the north and south line between the two sections. Afterwards, Stewart built another house, of two stories, a little south and east of the cabin, and also partially on the line. In these two houses he lived up to the time of contest, a period of nearly seven years. During this period he built a long and costly irrigating ditch, the dwelling house referred to, twenty-one by thirty-eight, of two stories, six doors and seven windows, a root house, poultry house, a shop, store room, stable of two stories, corrals, hay yard, and a long fence enclosing, by using the river as two sides, the entire property, with the exception of a space on the east for travelers crossing the ford and a space for them to camp and pasture their stock on. Stewart, at the time the land was surveyed, had made these improvements and had continuously lived on the land, with his wife and three children. So well had he improved this spot in the wilderness that before survey he was offered \$5,000 for it.

Some time after Stewart established himself and family on this land, one Skillman appeared, with his wife, on his way to the mines some twenty miles further north. Skillman, not desiring to take his wife further, Stewart agreed to let her stay on his property until Skillman's return, and, together with Skillman, built her a cabin near Stewart's own house. Some time after, and before Skillman's return, Mrs. Stewart and Mrs. Skillman failed to agree on some question, and the latter drove a stake in the ground near the cabin Stewart built for her, and "claimed" a big piece of Stewart's land. When Skillman returned, Stewart told Skillman no one but him (Stewart) was entitled to the valley, and Skillman traded his "claim" and cabin, though there is nothing to show he ever owned it, and part of Stewart's ditch, to one Orr. On Orr's appearance, Stewart notified him that he (Stewart) intended to take up the valley when the survey was established, and it would include part or all of the land on which the so-called Skillman cabin was. Orr then sold to one Webster. Stewart told Webster the

same, and notified him not to make any improvements, but the latter went on, with money furnished by one Doll, the defendant herein, and the Doll-Condon Cattle Company, and made improvements and cultivated, knowing all the time Stewart claimed the land.

Finally Webster left, and one Wilson took possession and afterwards Doll joined Wilson, and together they used the Webster improvements and the land in controversy, on which to raise crops and cattle.

The fact that Webster used money furnished by Doll and Doll's Cattle Company to make improvements on this land, and that in 1888, the year survey was filed, these improvements were assessed in the name of Wilson, who took possession after Webster, leaves an inference that Doll, who had no family, was not acting in good faith, but was resorting to artifice whereby to escape the notification from Stewart, which all the others had received, including Wilson.

Doll appears to be the only one to whom Stewart did not give notification, but as Doll kept in the background and Webster and Wilson acted really as his or his cattle company's agents, there is reason to infer the whole proceeding was a conspiracy to deprive Stewart of land he made all that it was worth, and that Doll was well aware of Stewart's claims, as the evidence shows it was the general understanding that the latter was entitled to the entire valley by reason of long and prior residence and improvements.

Your office decision is therefore modified, and you will allow Stewart to make final proof of the land as he claimed it; and reject the final proof of Doll and cancel his declaratory statement, so far as it conflicts with that of Stewart.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

SMITH *v.* SHAY ET AL.

An entry erroneously canceled on the report of a special agent without notice, is confirmed for the benefit of a transferee thereunder by section 7, act of March 3, 1891, as against a claim for confirmation set up by a transferee under an intervening entry, allowed while the order canceling the first entry was in force.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (J. I. P.)

August 19, 1882, Lewis Howe made pre-emption cash entry No. 3680 for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 32, T. 59 N., R. 17 W., Duluth, Minnesota, series.

June 15, 1883, said entry was canceled by your office, upon the report of a special agent, allowing Howe sixty days to apply for a reinstatement of said entry after notice.

September 23, 1883, John Comstock, as transferee of said land, made such application, upon which a hearing was ordered by your office

February 15, 1887. A hearing was had November 25, 1888, which resulted in a decision by the local office February 8, 1889, recommending the cancellation of said entry, from which decision Comstock appealed to your office March 30, 1889.

Pending appeal Alonzo Culbertson, October 10, 1889, made homestead entry No. 4529 for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 32, T. 59 N., R. 17 W., which conflicted with Howe's entry as to said E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$.

Pending proceedings in your office, viz: June 16, 1891, the Boston Safe Deposit and Trust Company filed an application to intervene, and for the confirmation of Howe's entry, under section 7, act of March 3, 1891, alleging that it, said company, was, prior to March 1, 1888, and still is, a *bona fide* encumbrancer of said land. The application to intervene was allowed. As appears from the abstract of title filed by said company, said encumbrance was a mortgage executed to said company on March 21, 1885, by the N. C. Nelson Lumber Company, the then owner of said land, which mortgage was unpaid and unsatisfied.

Under this state of facts, your office, on October 13, 1891, held the entry of Culbertson for cancellation, in so far as it conflicted with the entry of Howe, and further held that the Safe Deposit and Trust Company was a *bona fide* and legal encumbrancer of said land; that said case came within the provisions of section 7, act of March 3, 1891; that the entry of Howe was canceled without notice, which was contrary to law and the practice of this Department; and directed that Howe's entry be reinstated, and if said decision became final, passed to patent.

In the same series, Edward Shay, August 18, 1882, made pre-emption cash entry No. 3670 for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 32, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 29, T. 59 N., R. 17 W., which, on June 15, 1883, was canceled upon report of a special agent, and the entryman allowed sixty days from notice to make application for the reinstatement of said entry. Within that time such application was made by the said Comstock, as transferee of said land, and a hearing thereon, as ordered by your office, was held November 25, 1888, the result of which was that the local office, February 8, 1889, recommended the cancellation of said entry, from which decision the transferee appealed March 30, 1889. Between September 20, 1883, when Comstock's application for the reinstatement of said entry was made, and February 15, 1887, when your office ordered a hearing thereon, the local office permitted Michael G. Maher, on July 29, 1885, to make homestead entry No. 2652 for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 29, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{2}$ of Sec. 32, T. 59 N., R. 17 E., which was commuted to cash entry No. 8211, August 4, 1886, and which conflicts with Shay's entry as to the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 29, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 32, and with Howe's entry as to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 32. The Boston Safe Deposit and Trust Company also intervened in this case and asked the confirmation of Shay's entry under section 7 of the act of March 3, 1891, for

the same reason that it asked the confirmation of Howe's entry, *supra*, and made the same showing in support thereof.

By decision of October 23, 1891, your office held Maher's entry for cancellation, because of conflict with Shay's entry, and reinstated Shay's entry for the same reasons that Howe's entry had been reinstated.

By letter "P" of March 10, 1892, your office transmitted to this Department what it alleges is the appeal of Ira O. Smith from the decisions of your office dated October 13, 1891, and October 23, 1891, *supra*. A diligent search among the papers transmitted fails to disclose any appeal whatever from the decision of October 13, 1891, *supra*, the appeal on file transmitted by said letter of March 10, 1892, *supra*, being by James H. Swan and Ira O. Smith from the decision of October 23, *supra*. No action therefore by this Department with reference to the decision of October 13, *supra*, is necessary, and only such reference will be made thereto as its relation to the decision appealed from may render necessary.

Swan and Smith appeal as the transferees of Maher, alleging that they purchased said land embraced in Maher's entry from him October 27, 1886, in good faith, and that it was error in your office not to hold that they as such purchasers were entitled to have the entry under which they held confirmed under the act of March 3, 1891, in preference to any subsequent purchaser or encumbrancer under Shay's entry. That Maher's entry was made at a time when said land was vacant public land, and constituted a valid adverse claim, which should have prevented the reinstatement of Shay's entry, and that said entry should not have been confirmed under the act of March 3, 1891, because the lien of the Boston Safe Deposit and Trust Company was not shown to antedate Maher's sale. I do not think the position assumed by the appellant is a tenable one.

The cancellation of Shay's entry in the first instance was void for want of notice (LeCocq cases, 2 L. D., 784; Burke case, 4 L. D., 340; Castello v. Bonnie, 15 L. D., 354). Being void, it was as though it had not occurred. The entry of Maher was allowed while the application of Comstock was pending for a hearing, as per the instructions of your office. Hence the allowance of Maher's entry was without authority of law or the practice of this Department, and was made subject to all rights acquired or existing under Shay's entry (Gideon S. Beardsley, 4 L. D., 262. See also Melvin P. Yates, 11 L. D., 556; and Richards v. McKenzie, 12 L. D., 47.) The facts in this case are practically the same as those in the case of Thomas E. Taylor v. Patrick McKinney, decided September 28, 1892, by this Department (Letter Press Book No. 253, p. 213); same case on review (Letter Press Book No. 275, p. 331). The lands involved were in the same land district and the same township and range, and the questions presented were similar. In that case the decision of your office holding Taylor's entry for cancellation was entered without notice to him, and was modified so that Tay-

lor was allowed sixty days after notice in which to show cause why his entry should not be canceled.

For the reasons stated in that case, I direct that Maher or his transferees be allowed sixty days after notice of this decision within which to show cause why his entry should not be canceled. No hearing for this purpose will be ordered, but he may file his showing with the local officers, for transmittal to your office. If in your judgment sufficient cause is shown, you will adjudicate the case accordingly. If he fails to make the showing herein provided for, the decision appealed from will stand affirmed, and patent will issue for the land. Your decision of October 23, 1891, is therefore modified as herein provided.

By letter "P" of December 20, 1893, your office transmitted to this Department a letter from the local office at Duluth, dated November 7, 1893, together with the testimony and files in the contest of Alexander Carson *v.* Alonzo Culbertson, involving the lands embraced in Culbertson's entry, *supra*, for consideration in connection with the case at bar. As there is nothing before me with reference to the entry of Culbertson, for the reason that no appeal was taken from the action of your office of October 13, 1891, the papers and record transmitted by your office letter "P" of December 20, 1893, are herewith returned to your office for appropriate action thereon.

RAILROAD GRANT-INDEMNITY-WITHDRAWAL-SELECTION.

SOUTHERN PACIFIC R. R. Co.

The statutory withdrawal on the location of the roads for which the Pacific grants were made extends only to lands within the granted limits, and all withdrawals of indemnity lands on account of said grants rest on executive authority alone; consequently such indemnity-withdrawals may be revoked by the Secretary of the Interior whenever in his judgment the necessities of the case require such action.

No rights are acquired to indemnity lands prior to selection.

An order revoking an indemnity-withdrawal restores the lands embraced therein to the public domain, and the subsequent selection of such land on account of the grant can not be made in the presence of a prior intervening entry.

Secretary Smith to the Commissioner of the General Land Office, March
J. I. H. 31, 1894. F. W. C.

I have considered the appeal by the Southern Pacific Railroad Company from your office decision of October 12, 1892, sustaining the action of the local officers at Independence, California, in rejecting said company's indemnity list No. 1, presented March 29, 1888, "because some lands are patented to settlers and others are covered by settlers' entries."

The sole question raised by this appeal is as to the effect of the order

of August 15, 1887, revoking all previous orders of withdrawal of indemnity lands on account of this grant and directing the restoration of such lands within the indemnity limits as had not been selected by the company.

It is claimed on behalf of the company that the lands within both granted and indemnity limits were withdrawn, by force of the act making the grant, upon the location of the road; that no disposition could be made of them thereafter, except as provided in the act making the grant, and as all the odd-numbered sections within the indemnity limits free from claim at the date of definite location would but partly satisfy the grant for losses within the primary limits prior to such location; that no selection was necessary to attach the rights under the grant to the lands within the indemnity limits.

It has been the uniform construction of this Department that the requirement to withdraw lands on account of the Pacific railroad grants upon the location of the roads, extended only to the granted lands; that all withdrawals of indemnity lands on account of these grants rest on executive action alone, and, consequently, that such indemnity withdrawals might be revoked whenever, in the judgment of the Secretary of the Interior, the necessities of the case required it.

This was the basis of the orders of August 15, 1887, which revoked all previous orders of withdrawal of indemnity lands on account of these grants, and the recognition of the adverse claimants as against the grant, to the lands in question, rests on said orders.

Such claims have been repeatedly recognized by this Department as against the grant under consideration. See *Southern Pacific R. R. Co. v. McWharther* (14 L. D., 610), and cases therein cited.

In the matter of the selection of indemnity lands it has been repeatedly ruled by this Department and the courts, that no right attaches within the indemnity limits under these land grants to aid in the construction of railroads, until selection has been made in the manner prescribed by the act.

The decision of the supreme court in the case of the *St. Paul and Pacific R. R. Co., v. Northern Pacific R. R. Co.* (139 U. S., 1), is not authority for holding that any rights attach within the indemnity limits prior to selection, sufficient to amount to an appropriation of the lands as against the United States, and bar other disposition of the same, for, if it is, then the orders of August 15, 1887, were ineffective, as restoration could not be made of lands already appropriated.

In that case the question presented to the court for decision was as to the rights of the *St. Paul* company, claiming under a subsequent grant to that under which the *Northern Pacific Railroad Company* claimed, to take lands within the indemnity limits of the prior grant, when, by the agreed statement, it was admitted that such lands were necessary to satisfy such prior grant.

It is admitted that the right of selection within the indemnity limits to satisfy losses within the primary limits accrues upon the definite

location of the road, or as soon as it is possible to ascertain the loss to the grant.

While these acts making the grants for Pacific roads require the President to cause the lands to be surveyed within forty miles on each side of the line of road, as soon as the general route shall be fixed, yet, the appropriation of sums sufficient to accomplish this purpose rests with Congress and even today broad expanses within the limits of these grants yet remain unsurveyed.

Until surveyed, an adjustment of these grants is impossible and while the right to select, dates from the definite location of the road, yet it remains to identify the loss and this can not be done until the lands are surveyed.

As between two grant claimants it may, however, be admitted that all the lands within the indemnity limits will but partly satisfy the indemnity grant, and as against such subsequent grant the court holds that nothing can be taken within such indemnity limit as, by its own admission, they became appropriated upon the definite location of the line of road on account of which the prior grant was made.

That this was as far as the court meant to go in that case clearly appears by its decision in the case of the *United States v. Colton Marble and Lime Co.* (146 U. S., 615).

In that case the court says:

The ordinary rule with respect to lands within indemnity limits is, that no title passes until selection. Where, as here, the deficiency within the granted limits is so great that all the indemnity lands will not make good the loss, it has been held, in a contest between two railroad companies, that no formal selection was necessary to give them to the one having the older grant, as against the other company. *St. Paul & Pacific Railroad v. Northern Pacific Railroad*, 139 U. S. 1.

I see nothing in the argument of counsel to warrant a change in the uniform construction of these grants, and as no selection had been made of the lands in question prior to August 15, 1887, I must hold that they were thereby restored to the public domain, and as entries were made prior to the assertion of right under the grant by selection, that the condition of the lands at the date of selection alone determines whether they were subject to selection. *Missouri, Kansas and Texas Ry. Co. v. Beal* (10 L. D., 504); *Hensley v. Missouri, Kansas and Texas Ry. Co.*, (12 L. D., 19).

Your office decision is affirmed and the company's application to select the lands in question will stand rejected.

TIMBER CULTURE CONTEST—COMPLIANCE WITH LAW.

CAMERON v. KLINE.

Due compliance with the timber culture law requires the land to be properly prepared for planting, the trees to be planted when the ground is in proper condition therefor, and such cultivation and protection given the trees thereafter as will best secure their healthy growth.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (J. L.)

I have considered the appeal of Peter Cameron from your office decision of August 19, 1892, in the case of Peter Cameron v. J. C. W. Kline, reversing the decision of the local officers, and dismissing Cameron's contest against Kline's timber-culture entry No. 3,27, of the N. $\frac{1}{2}$ and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 6, T. 20 N., R. 11 E., 6th principal meridian, Neligh, Nebraska, land district, containing one hundred and twenty acres.

The record shows the following case:

On January 23, 1885, one George Sutherland, who owns land east of and adjoining the land in contest, made timber-culture entry of said land. He relinquished it to the United States on January 25, 1886, and on the same day Kline made his timber-culture entry thereof.

On April 8, 1890, Cameron filed his affidavit of contest against Kline's entry, alleging in detail that Kline had failed and neglected to comply, in good faith, with the requirements of the timber-culture laws.

A hearing was ordered for May 21, 1890; on which day Kline appeared by N. D. Jackson, as his attorney, acting under a power of attorney executed by Kline at Neligh, Nebraska, on that very day, May 21, 1890, and filed a written objection to the jurisdiction of the register and receiver over the person of Kline, and therein alleged, "for the reason that no service of notice of this contest has been had on this defendant." Whereupon the hearing was postponed until July 9, 1890, and a new notice issued for that day.

On July 9, 1890, it appeared that the allegation aforesaid was untrue; and that in fact the first notice of hearing was duly served upon Kline on April 19, 1890, by placing in his hands a certified copy thereof. Both parties were present by their attorneys. The second notice had not been served, because Kline could not be found either at his home in Washington county, Nebraska, or at the Hot Springs in South Dakota where he was said to be at work. Cameron filed a written motion that the register and receiver assume jurisdiction of, and proceed with, the hearing of the case, under and by virtue of the first notice, which had been returned to the local office on May 28, 1890, with proof of service duly endorsed thereon. Kline, by his attorney N. D. Jackson, filed a written objection to said motion; and said Jackson filed his personal

affidavit in which he stated: that no notice of *this hearing* had been served on Kline since May 21, 1890; that on that day he had advised Kline that it would be unnecessary for him to appear on July 9, unless some notice should be served on him from the local office; that Kline is a civil engineer in the employment of the Fremont, Elkhorn and Missouri Valley Railroad Company, and was, at the time when affiant was last informed as to his whereabouts, at work for said company in the State of South Dakota, and that affiant believes him to be so engaged now; that Kline, when at home, resides at Blair, about one hundred miles or more from this land office; that he is not now present at the land office, and affiant does not know where to reach him; that none of Kline's witnesses are present at the land office, and affiant does not know where they are.

The local officers overruled Kline's objection, sustained Cameron's motion, and assumed jurisdiction of the case. But they postponed the hearing until September 8, 1890, and required the contestant to notify the defendant of the pendency of the case. And a new notice for September 8, 1890, was served on Kline personally, on July 16, 1890, at his home.

Between September 8 and September 25, 1890, a hearing was had. Cameron appeared in person with C. F. Bayha as his attorney, and Kline appeared by S. D. Thornton, as his attorney. Testimony was submitted by both sides, and the case was closed.

On September 30, 1890, the local officers rendered their joint decision recommending that Kline's timber-culture entry be canceled.

Kline appealed to your office.

On August 19, 1892, your office reversed the decision of the local officers, dismissed Cameron's contest, and held Kline's entry intact.

Cameron appealed to this Department.

I am constrained to approve the recommendation of the local officers. The diligence and good faith of the entryman, Mr. Kline himself, are on trial in this contest. The evidence proves that he has been negligent and indifferent. Since the date of his entry January 25, 1886, he has done nothing except to sign two letters appointing Jackson and Thornton as his attorneys, and an affidavit about witnesses. There is no proof that he has ever been upon the land, or has ever seen it or has ever spent a cent of money on it.

George Sutherland, a witness, who has had absolute control of this tract of one hundred and twenty acres, and has cut, harvested, and used the hay that grew upon it, testified that he acted as agent for Mr. Kline. Kline does not say so, either in person or by the mouth of any other witness. There is no evidence that Sutherland ever claimed to be Kline's agent, until compelled to do so by the exigencies of this contest. On the contrary, the testimony of all the witnesses on both sides, including neighbors and employes of Sutherland, tends to prove that he permitted himself to be held out and reputed as the owner of the

claim. Sutherland did not inform his alleged principal, Mr. Kline, that the timber plantation had been burnt over in 1888, and all the trees destroyed.

If Sutherland were Kline's agent, then Kline who has given no personal attention to the property, must be held responsible for Sutherland's negligence, defaults and bad faith.

Sutherland testifies that seven and a half acres were broken in 1886, the first year. This breaking was so badly done that in 1890, after four years of alleged cultivation, it took careful examination to tell where the line was between the broken and the unbroken ground.

In the spring of 1887, Sutherland sent C. C. Thompson, one of his own hired men, to sow rye on the broken land. The grass was knee deep. The harrow made no impression on the ground; would strike it once in a while. The land was pretty wet. Nothing came of this rye; only once in a while a spear.

Sutherland testifies in respect to this sowing of rye, that Thompson sowed the grain and Austin did the harrowing; that the land "was grassy and miry—but no water—our horses got mired several times;" that no crop was harvested; that he did not expect any crop when he sowed the rye; that he "thought at the time that the law required it sown to a crop;" not cultivated.

In the fall of 1887 the seven and a half acres were plowed.

In April, 1888, they were planted to trees. Sutherland testifies: "At the time of the planting, the ground was under water from two to four inches, and the men doing the planting had to wear gum boots; the roots of the trees being laid on the ground and pushed down with a forked stick."

Jacob L. Day, one of Sutherland's men, testifies: "We had a measure we set by. We had a paddle we stuck down, put the trees in and pushed the earth about them with the paddle"—"the earth was a little water and mud, both mixed." "We set the trees four feet apart one way and eight feet the other." "I don't know that I can answer how many trees we planted on each acre. We aimed to set out the number the law requires: 2,700 to each acre. We only got half the number to each acre.

In November, 1888, a prairie fire swept over the seven and a half acres, and destroyed the dry grasses and weeds, and the trees aforesaid.

In April, 1889, part of said patch was plowed and worked over with an eight-foot disk harrow, and set to cuttings, 22,000 in number, four feet apart each way, and seven hundred and fifty walnut seeds were planted.

Thomas E. Shadrick, then keeper of Sutherland's stock and one of the hands, testified that part of the ground was in good condition and part of it pretty wet; that about four and a half acres were ploughed; that in some places there was considerable grass; that the ground was

soft; that the cuttings he pushed in with his hand, and the walnut seeds with his foot.

In the early spring of 1890, another prairie fire swept over this timber plantation and destroyed it.

On April 8, 1890, Cameron's notice of contest was filed; and on April 19, 1890, it was served by delivering a true copy into the hands of Kline.

In the latter part of April, 1890, Sutherland sent another one of his men, George W. Davis, to set out thirty-seven hundred cuttings.

The proof is that no attempt was made to cultivate the trees, or the cuttings, or the walnut seeds, after they were planted. Grasses, and weeds, and canes were permitted to grow up in their midst, as upon the adjoining unbroken land, and they—when dry—invited the fires which twice destroyed the plants.

This tract was selected for timber-culture with knowledge that it was Missouri river bottom land, rank in weeds and grasses, subject to overflow by waters from the river and from Silver creek, and exposed to devastation by fires from railroad engines, and other causes.

A broad deep ditch extended all around the seven and a half acres dedicated to timber-culture, with the earth dug out banked on the inside, would have drained the land and checked the fires. If the lot had been assiduously cultivated, like a thrifty farmer's corn-field, with the plow and the grubbing hoe, and chopped with the weeding hoe, until the weeds and grass were exterminated, the tree-plants would have been fire proof, and they would not have been choked or burned.

The rulings of this Department on this subject are explicit.

A party taking up land in the arid country without the means of complying with the stringent provisions of the law, does so at his own risk. 1 L. D., 123.

Non-compliance with the law will not be excused on the plea that the land is too wet for the successful cultivation of trees, where it appears that the character of the land was known at the time of entry, and that no effort was subsequently made to reclaim or properly prepare it for cultivation. 8 L. D., 511.

Planting of trees should be done when the ground is in such condition as will, under ordinary circumstances, be favorable to their growth. One who entrusts the care of a timber-culture claim to an agent, is responsible for the negligence of his representative in failing to comply with the law. 12 L. D., 476.

The cultivation of trees required by law, is such care and attention as will best promote their healthy growth. 1 L. D., 130; 4 L. D., 174.

It is incumbent upon the entryman to make adequate provision for the protection of the trees planted on the claim. 14 L. D., 98.

Your office decision is hereby reversed. Cameron's contest is sustained, and Kline's timber-culture will be canceled.

TIMBER LAND—FIELD NOTES OF SURVEY.

BROWN v. WRIGHT.

In a contest involving the character of a tract of land embraced in a timber land application, where the evidence is contradictory, and the land is returned "third rate, hilly, and rolling and very densely timbered with hemlock, fir, spruce and cedar," the field notes may be accepted as conclusive, in view of the fact that the land is of the lowest quality of soil indicated by government surveyors.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (W. F. M.)

On November 20, 1890, Joseph B. Wright made application, under the timber and stone act, to enter the SW. $\frac{1}{4}$ of Section 32, Township 31 N., Range 10 W., of the land district of Seattle, Washington.

On January 13, 1891, Matthew A. Brown filed protest against the acceptance of Wright's final proof which was submitted on March 12, 1891, alleging that "the land is agricultural in character and not subject to entry under the act of June 3, 1878."

A hearing was had, beginning January 11, 1892, Brown, meanwhile, having made application to enter the land under the homestead laws on October 21, 1891.

The register and receiver recommended that Wright's final proof be rejected, saying that they "have carefully considered the testimony, taking into consideration the experience of the witnesses and their acquaintance with the land and are of the opinion that while the testimony is directly contradictory, the weight of evidence is with the contestant."

The decision of your office, now on appeal here, while admitting the "direct conflict of the testimony on the essential points" of the case, takes a contrary view, preferring to "believe the testimony of defendant and his witnesses against that of the plaintiff."

From a painstaking examination of the evidence I find that there is little to be said of it beyond the general statement that the witnesses manifest great zeal, not to say bias, in favor of their respective principals, and that there are no internal badges or indicia of error or falsity.

Under these circumstances I have had recourse to the field notes on file in your office, and I find that the land in controversy is returned as "third rate, hilly and rolling, and very densely timbered with hemlock, fir, spruce and cedar."

In view of the contradictory character of the evidence and of the fact that the land is of the lowest quality of soil indicated by the government surveyors, I shall hold these field notes to be decisive of the case.

The record discloses that Wright is not a natural born citizen of the United States, but in proof of naturalization he has filed a certified copy of a judgment of the county court for Kings county, New York, admitting to citizenship J. Zidmead Wright. This discrepancy appears to have been overlooked as well by the local office as by your office.

The decision of your office is, therefore, affirmed on condition that the timber land claimant, Joseph B. Wright, furnish proof of his identity with the person named in the judgment aforesaid, admitting J. Zidmead Wright to citizenship, or other satisfactory evidence of naturalization.

PRACTICE—APPEAL—HEIRS OF HOMESTEADER.

PUTNAM *v.* HARDECKE.

An appeal filed on behalf of the heirs of a homesteader will not be entertained in the absence of satisfactory proof of the entryman's death, and a specific statement as to the parties claiming the right to be heard as heirs.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (A. E.)

An appeal from your office decision of August 13, 1892, made in the above entitled cause, has been received.

The record shows that on February 4, 1888, Charles Hardecke filed a declaratory statement of his intention to pre-empt the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 34, T. 25 N., R. 6 E., W. M., Seattle, Washington, and that on January 8, 1889, Ellis Putnam made homestead entry for the same land.

On December 18, 1890, Hardecke made final proof, against the acceptance of which Putnam filed a protest, alleging that defendant had never established a bona fide residence on the land, nor cultivated and improved it as required by law; and that he had not submitted his proof within the required time.

A hearing was held, and the local office recommended that the final proof be allowed, as the allegations of the plaintiff Putman were not sustained.

By office letter ("G"), dated August 13, 1892, your office affirmed the local office, and decreed that, "upon this decision becoming final and defendant's claim being perfected into an entry, plaintiff's homestead entry will be canceled."

From this an appeal is filed in the case signed by "H. E. Shields, attorney for the heirs of Ellis Putman, deceased." Attached to this is an affidavit signed by said H. E. Shields, to the effect that affiant is informed and believes that Ellis Putman, the before mentioned contestant, was killed at or near Gilman, in the county of King and State of Washington, on or about the day of , 1892; that affiant bases his knowledge and information as to the death of said Ellis Putman upon the notice of his death published in the newspapers of the city of Seattle, in said county, and from information obtained from Laura S. Putman, widow of Ellis Putman, deceased.

This affidavit is not sufficient proof of entryman's death to allow his heirs to be substituted in this case, and an appeal simply by heirs, without stating who those heirs are, is not definite as to the parties in interest. The appeal is therefore dismissed.

SWAMP LAND—FIELD NOTES OF SURVEY.

MURPHY v. STATE OF MINNESOTA.

The field notes of survey are *prima facie* evidence of the character of land claimed under the swamp grant; but it is always competent for any adverse claimant under the public land laws to assail the correctness of the returns.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (J. L. McC.)

The St. Paul and Duluth Railway Company, claimant under and grantee of the State of Minnesota, has appealed from the decision of your office, dated November 3, 1892, rejecting the claim of said State, under the swamp land act of March 12, 1860 (12 Stat., 3), to the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 18, T. 49 N., R. 21 W., Duluth land district, Minnesota.

James Murphy filed pre-emption declaratory statement for said tract on November 25, 1889. As it was claimed by the State of Minnesota (although not approved and certified to said State), the filing was allowed "subject to the swamp land claim" of the State.

Proceedings were thereafter had in pursuance of the circular relative to entries and filings on lands claimed as swamp lands, approved by the Department December 13, 1886 (5 L. D., 279).

As the result of the hearing had, the local officers, and on appeal your office, found that each forty-acre tract of the land in controversy was not swamp land, within the meaning of the act.

The railway company, (grantee of the State), files eight allegations of error, which may be reduced in substance to two:

First. Error in finding, as a fact, that the land was not swamp and overflowed.

I have carefully examined the testimony, and find that it clearly shows, as held by the local officers and your office, that much the larger part of each forty acre tract embraced in the land in contest "is high, dry, rolling agricultural land, and not swamp or overflowed at the date of said grant."

The appellant further alleges that your office was in error "in not holding and deciding that the title of the State and its grantees is governed by the character of the land at the dates of the grant and survey as shown by the field-notes," i. e., irrespective of the facts disclosed relative to its character.

I cannot find that the Department has ever held that land which was not swamp land in fact passed to Minnesota, simply because it was returned as such by the field-notes. The field-notes are held to be *prima facie* evidence of the character of the land; but it is always competent for any claimant under the public land laws to assail their cor-

rectness; but in such case, as directed by rule 6 of the circular of December 13, 1886 (*supra*):

Where swamp-land selections are based upon the field notes of survey, and the land is alleged not to have been swamp and overflowed, * * * the burden of proof will be upon the contestant or adverse claimant under the public land laws.

While otherwise (see rule 3 of the same instructions) the burden of proof would be upon the State.

In the case at bar, inasmuch as the field notes showed the land to be swamp, the burden of proof was upon the claimant under the public land laws to show the incorrectness of said field notes. I am of the opinion that it was clearly shown that the field notes were incorrect, and that the land was not swamp in character.

The decision of your office is therefore affirmed.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

KNIGHT *v.* HOPPIN ET AL.

The initiation of a contest against an entry prior to the passage of the act of March 3, 1891, will not defeat confirmation under the body of section 7 of said act, if the entry is otherwise within the terms of said section.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (G. B. G.)

The land involved herein is the SE. $\frac{1}{4}$ of Sec. 22, T. 108 N., R. 54 W., Mitchell land district, South Dakota.

On December 2, 1880, Rossiter D. Hoppin made homestead entry for the tract, and on November 30, 1886, made payment, and received final certificate.

On March 20, 1889, the plaintiff, Edwin A. Knight, filed affidavit of contest, alleging non-compliance with the law.

A hearing was had on September 23, 1890, and on June 8, 1891, the local officers found in favor of claimant, from which contestant appealed.

Your office found that the entry fell within the provisions of the transfer clause of Sec. 7, of the act of March 3, 1891, and the transferee and entryman were called upon to furnish evidence of the incumbrance.

In response thereto they have furnished evidence that on February 8, 1887, the entryman conveyed the land included in his entry to E. H. Jacobs, trustee, to secure the payment on January 1, 1892, of \$200, paid to Hoppin by the American Mortgage and Investment Company, of Madison, Dakota; that on October 31, 1888, said mortgage or trust deed was assigned to Coleman by the trustee, for a valuable consideration; that Coleman is still the owner thereof, and that none of the principal of the mortgage has been paid, or satisfied in any manner, though the interest has been paid.

On August 12, 1892, your office held that the case was within the

provisions of Sec. 7, of the act of March 3, 1891, and confirmed the entry for patent.

The contestant has appealed to the Department, and assigns as error substantially, that your office fails and refuses to recognize the alleged rights of the contestant under the proviso of Sec. 7, of the act above cited.

Section seven of the act of March 3, 1891 (26 Stat., 1095), is as follows:

Sec. 7. That whenever it shall appear to the Commissioner of the General Land Office that a clerical error has been committed in the entry of any of the public lands, such entry may be suspended, upon proper notification to the claimant, through the local land office, until the error has been corrected; and all entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry, and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance: *Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

In the case at bar it is admitted, that final proof and payment had been made, and certificate issued: that there were no adverse claims prior to final entry; that the land had been incumbered prior to March 1, 1888, and after final entry to a bona fide incumbrancer for a valuable consideration; that no fraud on the part of the purchaser has been found by a government agent, and that none exists.

It is insisted, however, that inasmuch as the contest herein was instituted prior to the passage of the act of March 3, 1891, (*supra*) that it was the initiation of a right intended to be protected by the proviso of section seven of said act, from the confirmatory provisions of said section.

The Department has been called on several times to pass on this identical question, and whatever difference of opinion may exist as to the intention of the act, it is now well settled that the so-called proviso of section seven of the act cited, is not a limitation on the confirmatory provisions of the same, and that the initiation of a contest or protest prior to the passage of the act, will not prevent the entry from passing to patent, under the body of said section. See *Axford v. Shanks, et al.* (12 L. D., 250), and the same on review (13 L. D., 292); also *Shepherd v. Ekdahl* (ib., 537); *Stanley v. Howard* (15 L. D., 568) and *Whitney v. Griffith* (16 L. D., 518).

The rule *stare decisis* is recognized and followed in departmental

adjudications, and the question made in the case at bar will not be reopened.

The judgment appealed from is concurred in, and the same is hereby approved and affirmed.

PRE-EMPTION—SETTLEMENT—TRESPASS.

LEWIS v. NUCKOLLS.

No rights are acquired under the pre-emption law by a forcible intrusion on the inclosure of another.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (W. F. M.)

The record in this case shows that on June 20, 1889, George H. Nuckolls filed declaratory statement for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 20, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 21, township 7 S., range 92 W., within the land district of Glenwood Springs, Colorado, alleging settlement January 14, 1889.

On June 20, 1889, Sheldon L. Lewis also filed declaratory statement for the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 20 and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 21, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 28, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of section 29, township 7 S., R. 92 W., alleging settlement on June 1, 1888.

It will be seen that the two filings conflict as to the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 20, and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 21.

Nuckolls gave notice of his intention to make final proof on September 30, 1889, on which day Lewis appeared and filed a protest against the allowance of Nuckoll's entry for the tracts in conflict, for the reasons:

1. That he was the prior settler in good faith under a full compliance with the pre-emption law.
2. That Nuckolls has not resided continuously, or at all in good faith upon the land, or improved the same as provided by law.
3. That at the time of the alleged settlement of Nuckolls and for a long time thereafter he was a minor.

A hearing was had, beginning January 14, and concluding March 6, 1890, at which a great volume of testimony, covering over four hundred pages of manuscript, was taken. A decision was not rendered until November 6, 1891, some twenty months after the conclusion of the hearing. Pending this delay, a change had occurred in the administration of the local office, so that we have not the advantage of the opinion of the officers before whom the hearing was had.

Your office and the local office concur in dismissing Lewis's protest, and the case is now before me on appeal from the decision of your office to that effect.

Counsel for Nuckolls have interposed a motion to dismiss the appeal on the ground that it was not filed in time to allow of notice to the appellee within the delays allowed by the rule.

The record shows that notice of the decision of your office was sent to and received by Lewis's attorney of record on August 12, 1892, so that the seventy days prescribed by the rule would expire on October 21, 1892. It appears, however, that the appeal was filed in the local office on October 20, 1892, and that notice to Nuckolls's counsel, who resides at Denver, was deposited in the post office on the same day. The distance from Glenwood Springs, the situs of the local office, to Denver, is less than four hundred miles, and the running time, by fast mail train, is shown to be about thirteen hours. It is reasonable to conclude, therefore, that a letter posted at Glenwood Springs on October 20, would reach the addressee on the following day.

The motion to dismiss is overruled.

The ample statement of the facts of the case contained in the decision of your office, on the merits, renders it neither necessary nor useful to go over that ground here. The evidence convinces me that Lewis's settlement was accomplished by forcible intrusion upon the inclosure of another man. The pitching of his tent on June 1, 1888, when he claims his settlement to have been initiated, does not appear to have been accompanied by violent acts, or show of force, but by his own admissions, when the season for farming operations was at hand, he appropriated to his own use the better part of the meadow land, a part of the plowed land, and the water rights of the contestee, having previously made personal service upon him, at the muzzle of a rifle, of the following notice: "You are hereby notified not to trespass upon or do any work on any part of the land that I claim either in person or by agent. What you plant I will reap." Nuckolls was practically dispossessed of all his improvements except the house in which he lived and a few acres of land about it.

Under my view of the case, it is not important to do more than merely advert to the fact that, though he is shown by the evidence to have been in possession, either in person or through others representing him, since 1884, the contestee, in his declaratory statement, alleges settlement on January 14, 1889, and that this apparently tardy formal showing of settlement was induced by the fact that on that day he attained his majority, and became, therefore, a qualified pre-emptor. The essential question, as it appears to me, is whether or not Lewis's intrusion on the inclosure of another by violence creates an equity, or a legal right superior to that other, or, indeed, whether he acquires any right at all.

In a case somewhat similar to this, in which its equitable powers were invoked to declare a trust in favor of a forcible entryman, the supreme court of the United States said that "if there be any principle

of law which requires this, the court must be governed by it, but it is idle to pretend that such a decree would be founded in natural justice." *Frisbie v. Whitney*, 9 Wallace, 187.

In the later case of *Atherton v. Fowler*, 96 U. S., 513, where the question was fairly before the court, it was held that "such an intrusion, though made under pretense of pre-empting the land, is but a naked, unlawful trespass and can not initiate a right of pre-emption."

I think the conduct of Lewis was in law a "naked trespass," and his case is, in my judgment, strictly within the doctrine just quoted, and can find no sanction either in law, in equity, or in the principles of natural justice.

The decision of your office is, therefore, affirmed.

WATER FRONTAGE—PLAT OF SURVEY.

LEWIS W. PIERCE.

An entryman who acquires a water frontage through an entry based on the recognized plat of survey will not be deprived of such right by a subsequent survey that enlarges the acreage of the section.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (F. W. C.)

I have considered the appeal by Lewis W. Pierce from your office decision of December 14, 1892, sustaining the action of the local officers in rejecting his application to make entry of lot No. 1, Sec. 19, T. 53 S., R. 42 N., Gainesville land district, Florida, because the same had passed beyond the jurisdiction of your office in the patent issued to W. H. Gleason upon his homestead entry made April 4, 1870.

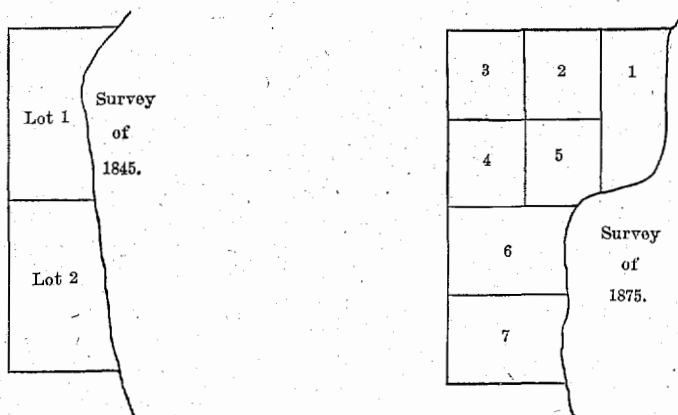
Said entry by Gleason was made under a survey of this township approved August 1, 1845.

The plat of this survey shows said section 19 to be fractional, embracing lots 1 and 2, together aggregating 164.84 acres for which Gleason made entry as before stated.

Final proof was made upon said entry on January 12, 1877, and patent issued thereon June 24, 1878.

A new survey was made of this township, which was approved February 1, 1875, and this survey shows a much greater amount of land within said section than that shown by the plat of 1845.

The two surveys are here roughly represented.



In the case of *W. H. Gleason v. Pent* (14 L. D., 375), it was held, referring to the entry now in question: "When, therefore, the patentee made his original entry, the then official survey of 1845 was as claimed by counsel an assurance of the proprietor that a riparian estate was for sale."

In that case the right to make entry of lot No. 2, under the survey of 1875 was involved, and it was held to have been an accretion since the survey of 1845.

That case is decisive of the one here in question for, if lot No. 2 is an accretion since the survey of 1845, surely lot No. 1, must be, as it lies between lot No. 2 and Biscayne Bay, which forms the eastern boundary of this section.

In the appeal under consideration, however, it is claimed that the land in question cannot be an accretion, as timber is growing thereon more than one hundred years old; that there must have been a mistake in the original survey, and to ascertain the facts a hearing is desired.

To admit that there was a mistake in the survey could not, to my mind, alter the case, for it is not claimed that, even if a mistake had been made, Gleason was in anywise responsible for it, or that it was made through his connivance.

He made entry fifteen years after the survey of 1845, and his contract with the government was based upon the recognized plat then on file. This assured him a water front and undoubtedly this fact influenced his selection of the land. This being so, no subsequent survey can deprive him of his frontage on the water.

Whatever view is therefore taken of the matter, your decision must be, and is accordingly hereby affirmed.

CONTESTANT—SALE OF PREFERRED RIGHT.

BEANE *v.* MONTGOMERY.

The preferred right of a successful contestant will not be held forfeited on a charge that he has sold such right to another, where it appears that the contract of sale, if made, was not carried into effect, and that the contestant promptly applied to exercise his right as soon as the record was cleared.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (P. J. C.)

The land involved in this appeal is the SE. $\frac{1}{4}$ of Sec. 20, T. 2 S., R. 36 E., Blackfoot, Idaho, land district.

It seems from the record that John Montgomery, Jr., on August 9, 1889, filed an affidavit of contest against one Munn's timber-culture entry—No. 708—of this tract, and with it his application to make timber culture entry on the land. This proceeding ripened into a judgment of cancellation by your office August 6, 1890. On August 9 following Montgomery tendered again his timber application, and the same was rejected by the register, "on account of land being covered by prior timber culture entry No. 708." On August 11 following Frank W. Beane made timber culture entry of the tract, "subject to the preference right of John Montgomery, Jr." Montgomery, again, on August 19, 1890, presented his application, and the same was accepted, and, according to the report of the local office, "at the same time Mr. Montgomery was notified that Beane would be cited to show cause why his entry should not be canceled, and that of Montgomery allowed to stand." By the same report it is shown that Beane "submitted a corroborated affidavit to the effect that Montgomery had forfeited his preference right," by having sold it "to one Gerber," prior to the final termination of the Munn case in your office, and they recommended that Montgomery's entry be canceled, and Beane's entry remain intact. Your office, on January 12, 1891, reversed the action of the local office, but, "upon Beane's motion for a new trial, on the ground of newly discovered evidence," your office, on March 13, 1891, reversed its action of January 12, 1891, and ordered a hearing for the purpose of determining whether "Montgomery really sold his preference right." As a result of this hearing had before the local officers, they again recommended the cancellation of Montgomery's entry, and that Beane's should remain intact. On appeal, your office, by letter of March 30, 1892, reversed the action of the register and receiver, and held, by implication at least, that Montgomery's right dated from his entry of August 19, 1889. A motion for review was filed by Beane, and Montgomery presented a motion for a modification of your office decision of March 30, 1892. By letter of October 14, 1892, your office overruled the motion for review, and granted the motion of defendant, and modified your former office judgment to the extent of deciding that Montgomery's right

dated from the time he filed his application to enter with his contest against Munn, under the authority of *Barber v. Rowley* (14 L. D., 315). The case now comes before the Department on appeal by Beane. The errors assigned are on the questions of fact as disclosed by the evidence.

The charge here—informally made—is that Montgomery forfeited his preference right by having sold it to one Samuel Gerber for a consideration prior to the decision in the Munn case. To sustain this charge, there is introduced an alleged copy of a contract, dated November 22, 1889, between John Montgomery and one Eliza Gfeller, by which it is agreed that if the contest case is decided against him he will pay Gfeller "the amount he has received from her for the relinquishment of his preference right of entry to the above-described land (that in controversy), viz: \$50 in cash and her note payable in 6 months with the privilege of running ten, for \$50 more." There is a further condition that she will pay him \$50 in cash and will give her note for \$50; this "in consideration of the said covenants," as above quoted.

Granting that this is true, yet, in the face of the record, can it be said that Montgomery forfeited his preference right to the land? I think not. If the contract was actually made, it was not carried into effect. When the record was cleared in the local office, Montgomery promptly sought to exercise his preference right, and finally did so. Therefore, giving the contestant the full benefit of the testimony offered—without passing upon its competency, which I think is questionable—I do not think his contest can be sustained.

Your office judgment is therefore affirmed.

In the files I find a second contest by Beane against Montgomery, which has been initiated and tried during the pendency of the case under consideration. Inasmuch as your office has not passed upon this last proceeding, it is returned for your consideration.

HOMESTEAD CONTEST—ABANDONMENT—LEAVE OF ABSENCE.

HILTNER *v.* WORTLER.

Where a leave of absence is granted a homesteader under the act of March 2, 1889, a charge of abandonment will not lie against the entry until the expiration of six months after the time for which the leave of absence was granted.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (E. M. R.)

This case involves the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$; the SE. $\frac{1}{4}$ of the NE. $\frac{1}{2}$, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 34, T. 34 N., R. 36 W., Chadron land district, Nebraska.

The record shows that on October 16, 1890, on application and showing made, Wortler, who had made homestead entry for the above-

described tracts on September 23, 1887, was granted a leave of absence for one year.

January 21, 1892, Ferdinand Hiltner filed an affidavit of contest, alleging "that said John Wortler has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law; that he has been continuously absent from said claim since November 1, 1890, and that said Wortler had left the State of Nebraska for the State of Iowa and has not since returned, and he further asked that notice be given by publication.

At the trial on March 8, 1892, the contestee filed a motion to dismiss the contest on the following grounds: First, that the same is prematurely brought, six months not having passed since the expiration of the leave of absence; second, that proper service has not been made upon the entryman; third, that service by publication can not be legally made, except upon non-residents of the State, and this relator submits that his absence from the tract does not show non-residence of the State, or abandonment.

April 2, 1892, the register and receiver dismissed the contest under the first objection. Your office decision of August 12, 1892, sustained the ruling below.

The leave of absence granted was under the act of Congress of March 2, 1889 (25 Stat., 854), of which section three is as follows:

That whenever it shall appear to the register and receiver of any public land office, under such regulations as the Secretary of the Interior may prescribe, that any settler upon the public domain under existing law is unable by reason of a total or partial destruction or failure of crops, sickness or other unavoidable casualty, to secure a support for himself, herself, or those dependent upon him or her upon the lands settled upon, then such register and receiver may grant to such settler a leave of absence from the claim upon which he or she has filed for a period not exceeding one year at any one time, and such settler so granted leave of absence shall forfeit no rights by reason of such absence: Provided, That the time of such actual absence shall not be deducted from the actual residence required by law.

In the year 1880 Congress passed an act upon the same subject matter (21 Stat., 543):—

That it shall be lawful for homestead and pre-emption settlers on the public lands or pre-emption settlers upon Indian reservations, in the States of Kansas and Nebraska west of the sixth principal meridian where there has been a loss or failure of crops, from unavoidable cause, in the year of eighteen hundred and seventy-nine, or eighteen hundred and eighty, to leave and be absent from said lands, until the first day of October, eighteen hundred and eighty-one under such rules and regulations as to proof and notice as the Commissioner of the General Land Office may prescribe; and during said absence, no adverse rights shall attach to said lands, such settlers being allowed to resume and perfect their settlement as though no such absence had occurred.

Under this act the cases of *Griffin v. Marsh* and *Doyle v. Wilson* (2 L. D., 28), were decided, in which it was held—"The homestead settlers having given notice of absence under the act of June 4, 1880, contest is dismissed, as six months after, their authorized leave of absence

had not expired, and abandonment is the only ground upon which the contest was brought."

The contest affidavit in this case alleges failure in settlement and cultivation, but no evidence was introduced to support such allegations, and the case now presents for consideration, under the act of March 2, 1889, the same facts that were passed upon by the cases, *supra*, under the act of June 4, 1880, the question at issue being whether there is any difference in the rights granted under the acts.

The leave of absence, it is well to state, must be under the last-mentioned act, as the former was restricted in its operation to the years 1879 and 1880, but a consideration of the wording of the two acts, does not show an intention to restrict the privileges granted by the first. The object of Congress was to permit those whose crops had been destroyed to seek elsewhere, for a period not to exceed a year, a means of livelihood. The act of 1889 made the application of the intent of Congress general, and refers to all of the public lands of the general government, with the exception of those in Missouri, without restriction to specific years.

The proviso contained in section three of the act certainly could not be construed to mean that adverse rights could attach during such absence, and such being the case, a charge of abandonment cannot stand until the expiration of six months after the time for which the leave of absence was granted, and as the contest was commenced and heard before the end of six months, it follows that it was premature and must be dismissed.

Your office decision is accordingly affirmed. In the papers I find a relinquishment made out by John Wortler on the 25th day of January, 1893, which I return to you for such action as you may deem proper.

RAILROAD GRANT-INDEMNITY SELECTIONS.

FLORIDA CENTRAL AND PENINSULAR R. R. Co.

Rights secured by railroad indemnity selections take effect as of the date when the selections are filed in the local office, and not from the date of their approval by the local officers.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (F. W. C.)

I have considered the appeal by the Florida Railway and Navigation Company, now the Florida Central and Peninsular Railroad Company, from the action taken by your office letter of February 6, 1890, holding, in effect, that certain selections presented in May, 1887, and approved by the local officers November 10, 1887, were not effective to reserve the land until the latter date.

The facts relative to said selections are as follows:

On May 2, 1887, the Florida Railway and Navigation Company applied to select certain lands under the provisions of the act of June 22, 1874 (18 Stat., 194), which list was rejected by the local officers, and the company appealed, the list being forwarded with register's letter of May 27, 1887.

It appears to have been the practice at the land office at Gainesville, Florida, not to make any note of tracts applied for by the company, where such application was rejected; consequently, they proceeded with the disposition of the lands applied for on May 2, 1887, allowing many cash entries, which entries appear to have been erroneously allowed to go to patent.

In revoking the indemnity withdrawals for this company, on August 15, 1887, it was held that:

The records of the local land office should show the exact status of every tract of land, so that parties applying to select or enter the same may not be misled. I have therefore to direct that you will ascertain whether the local land officers have failed to note on their records said selections of the company, and, if such be the case, you will cause such notation to be made immediately, if the lists are in your office or the local land office, and if the lists are not in your office, or the local land office, you will advise the company, through its resident attorney, that it will be allowed to file in the local land office duplicate lists of said selections, and the same will be noted on the records as of date when first presented.

Acting under this direction, your office returned the list of May 2, 1887, with letter of September 7, 1887.

Upon receipt of said list at the local office, the conflicts with the disposals after May 2, 1887, were noted, and the company was required, so it is alleged, to file a clear list, omitting the conflicts, that the same might be approved, which was accordingly done, the clear list being approved on November 10, 1887, and, together with the list of May 2, 1887, was returned to your office, with the letter from the local office dated November 11, 1887.

The letter of February 6, 1890, appealed from, holds that the company intended to substitute the list approved November 10, 1887, for the list previously filed on May 2, 1887, and thereby abandoned whatever rights it might have gained under the list as first applied for; that the entries allowed between May 2, 1887, and November 10, 1887, were valid, and that no steps should be taken for the recovery of the lands patented under said entries.

So far as the date of the selections is concerned, the facts plainly show that the selections, although not approved until November 10, 1887, would date from May 2, 1887, as originally applied for, if, as it appears, the list as originally presented was in due form and regular.

The mere fact that, for convenience in passing upon the lists, those tracts that were clear were separated from those in conflict, did not waive any rights either in the tracts in conflict, which would be protected by the appeal of May, 1887, undisposed of, or those that were

clear, the rights under which would date, not from the date of approval by the local officers, but from the date originally applied for. The selections in question should date from the date as originally applied for, and, if your records show the selections in question as of any other date, the same should be corrected.

As to the question of suit for the recovery of the patented tracts, this involves in addition to other questions, the validity of the selections, and as questions are pending, under consideration, a determination of which may affect this list, I reserve my decision in the premises that this question may be considered separately, and upon petition by the company, in which way the matter should more properly have been brought, and not by appeal.

CONFLICTING SETTLEMENT RIGHTS—EQUITABLE ADJUSTMENT.

HIGGINS v. HARRIS.

In case of conflicting claims arising through settlement before survey the rights of the parties may be equitably adjusted.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 31, 1894. (G. B. G.)

On July 3, 1891, Dayton J. Harris made homestead entry for lots 1 and 2 and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 6, T. 9 N., R. 2 W., Marysville land district, California, claiming settlement from October, 1884. At the date of the alleged settlement the land was unsurveyed, but plat of survey was filed in the local office June 30, 1891.

On the same date entry was made, the said Harris advertised his intention to submit final proof October 12, 1891, but died before that date, leaving several heirs, one of whom, Geo. P. Harris, was a minor seventeen years of age.

Another son, William P. Harris, was appointed administrator of the estate of said claimant, and appeared before the local office October 12, 1891, and submitted final proof.

On August 22, 1891, the plaintiff, John Higgins, filed an affidavit of protest against the allowance of said final proof, alleging that Harris had not made such improvements on the land as the law contemplated. September 21, 1891, said Higgins filed homestead application for the land involved, which was rejected by the local officers because of the prior entry of Harris.

When final proof was offered, as recited in the opinion appealed from:

Higgins filed an additional affidavit, in which he alleged settlement on the land involved in 1889; that he had been located on said land by said Dayton J. Harris, deceased; that previous to the filing of the survey Harris had not claimed said NE. $\frac{1}{4}$ of the section, but had claimed the NW. $\frac{1}{4}$ of said section, and that he, said Higgins, was the only settler there on claiming said land.

By stipulation of the parties the cause was continued until November 18, 1891, at which time a hearing was had, and the land awarded by the local officers as follows. The E. $\frac{1}{2}$ thereof, lot 1 and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ to Higgins, and the W. $\frac{1}{2}$, lot 2 and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ to Harris. Both parties appealed, and on July 25, 1892, your office modified the finding of the register and receiver, awarding the whole tract to Harris. Higgins appealed, and the case is before the Department for an adjudication on the law and the facts.

Concurring conclusions of your office and the local officers on a finding of fact as to the sufficiency of Harris' settlement and improvements are sustained by the evidence, and that feature of the case requires no further notice.

The chief difficulty arises in the application of the principle of the law of estoppel. The material facts are:

1st. Harris was the prior settler.

2d. Both settlements were made on the same quarter section, and before the lands were surveyed, or the lines defined.

3d. Harris thought his settlement and improvements were on the NW. $\frac{1}{4}$, when, as a matter of fact, they were on the NE. $\frac{1}{4}$, but on the land claimed by him by natural boundary from the date of his settlement. He was simply mistaken as to the quarter section he was on, and not as to the land he claimed.

4th. Higgins employed Harris to locate him on government lands, and Harris assisted him to locate where he now lives, which is on the extreme eastern border of the NE. $\frac{1}{4}$, and outside of the line Harris claimed too, but as has been seen, on the same quarter section after survey.

Both parties were innocent of any intended wrong, but it is insisted that defendants are estopped from setting up any claim to the land by reason of the acts of their ancestor in locating Higgins on the land.

The rule of equitable estoppel is that the loss should be borne by the one of two innocent parties, whose acts of omission or commission made the injury possible.

Under the facts in this case the rule would seem to deprive the defendants of the whole of the land in controversy, it being highly improbable that Higgins would ever have settled where he did had it not been for the acts and representations of Harris.

But the Department has adopted a rule of equitable disposition under such circumstances, that obviates the necessity of a harsh application of the rule, and seems eminently just to all parties concerned.

If the homestead settler, prior to survey can ascertain the lines of his claim, and so mark his boundaries that they will conform to the lines of public survey when extended, then his entire claim could be protected by compliance with the law. In cases where no boundaries are marked, or if marked, do not conform to the surveys, the rights of conflicting claimants to any particular subdivision must be determined by their priorities, improvements, etc., that is, by apparent equities. Commissioner McFarland's letter to register and receiver, at Grand Forks, Dakota (1 L. D., 414).

The equities in the case at bar are about equal, and the rights of the parties should be adjusted under the foregoing rule.

The conclusion of the local officers herein is correct, and is hereby affirmed.

The judgment of your office is reversed, and the cause remanded, with directions to allow Higgins to make entry for the E. $\frac{1}{2}$, and the Harris heirs for the W. $\frac{1}{2}$ of said quarter section.

RAILROAD LANDS—SECTION 3, ACT OF SEPTEMBER 29, 1890.

EASTMAN *v.* WISEMAN.

The provisions of section 3, of the forfeiture act of September 29, 1890, according a preference right of entry to persons who are in possession of forfeited lands under "license" from a railroad company, extend to one who takes possession of, and improves such lands under the circular invitation of the company, and in accordance with said circular applies to purchase said lands of the company.

The right of the licensee in such case is assignable, and may be exercised by an assignee who is in possession of the land by an agent.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 4, 1894. (G. B. G.)

May 18, 1891, Benjamin F. Wiseman made homestead entry for the NW. $\frac{1}{4}$ of Sec. 1, T. 7 N., R. 35 E., of the Walla Walla land district, Washington.

June 13, 1891, Thomas R. Eastman made application to purchase the tract under the provisions of the act of Congress approved September 29, 1890, which was rejected because of conflict with the previous homestead entry of Wiseman, whereupon, the same date, he filed corroborated affidavit of contest, alleging—

That he is well acquainted with the tract of land embraced in the homestead entry No. 4765, made the 18th of May 1891, for the northwest quarter of section 1, T. seven (7) north of range (35) E., W. M., and knows the present condition of the same. That the said land above described, was not subject to entry by said Benjamin Wiseman, or any one except this affiant, who, at the time of said entry by said Wiseman, and now, has a preference right to said tract of land; that he is a native-born citizen of the United States, over the age of twenty-one years.

That he applied to purchase said tract of land in good faith, for his own use, and not for the use of any person or persons; that he has not made any agreement by which the title he may acquire from the United States to this land, shall inure in whole or in part to any corporation, syndicate, person or persons whatsoever, (and further,) that he is in the actual peaceable possession of said land above described, and has been so in possession since the year 1876, and has been at all of said times, and is now, in possession of said land, under and by virtue of a license to his grantor from the Northern Pacific Railroad Company, a copy is hereto attached, marked "Exhibit A," and said land was so possessed and improved by affiant under said license, and under a license consisting of the resolutions of the said company, of October 12, 1871, and January 4, 1878, inviting and encouraging settlement and improvements of said land; that in good faith with bona fide intent to secure title thereto by purchase from said company, when earned by said company in compli-

ance with the granting acts of Congress, and under said license he has continued to occupy and improve said land. A circular issued by the Northern Pacific Railroad Company, explanatory of its policy in reference to said land is hereto attached, marked exhibit "B," and its reference also to said resolutions of October 12, 1871, and January 4, 1873; and the said circular is made part hereof. That the improvements placed on said land in the year 1879, and prior to January 1, 1890, are of the value of about five hundred dollars; that he has not sold or assigned his right to said land, or to any part thereof, nor to the improvements made thereto; and elects to enter the same under the third section of said act.

The issues presented by said contest were tried by the register and receiver, and were by them decided in favor of the contestant.

From this decision the contestee appealed, and on June 13, 1892, your office affirmed the finding of the local officers, and held the entry of Wiseman for cancellation.

Subsequently, the said Wiseman's attorneys filed a motion for review of said decision, and on August 13, 1892, your office, in a lengthy opinion, granted said motion, revoked the decision of June 13, 1892, reversed the finding of the local officers, and dismissed the contest. From said last named decision the contestant has appealed to the Department, and presents twelve assignments of error, substantially of law and of fact.

The land in controversy was a portion of that formerly included within the limits of the grant to the Northern Pacific Railroad, but was forfeited by the act of Congress approved September 29, 1890, (26 Stat., 496). Section 3 of said act provides *inter alia*:

That in all cases where persons, being citizens of the United States, or who have declared their intentions to become such, in accordance with the naturalization laws of the United States, are in possession of any of the lands affected by any such grant, and hereby resumed by and restored to the United States, under deed, written contract with, or license from the State or corporation to which such grant was made, or its assignees, executed prior to January 1, 1888, or where persons may have settled said lands with bona fide intent to secure title thereto by purchase from the State or corporation, when earned by compliance with the conditions or requirements of the granting acts of Congress, they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act, and on making said payments, to receive patents therefor, and where any such person in actual possession of any such lands, and having improved the same prior to the first day of January, 1888, under deed, written contract, or license as aforesaid, or his assignor, has made partial or full payments to said Railroad Company prior to said date, on account of the purchase price of said lands from it, on proof of the amount of such payments, he shall be entitled to have the same, to the extent and amount of one dollar and twenty-five cents per acre, if so much has been paid, and not more, credited to him on account of, and as part of the purchase price herein provided to be paid the United States for said lands, or such persons may elect to abandon their purchases, and make claim on said lands under the homestead law, and as provided in the preceding section of this act.

There are two distinct classes of persons referred to in the descriptive portions of the section quoted, and contestant asserts a preference right to enter the land in controversy, as filling the requirements of

both: 1st. Persons who "are in possession" of such lands, "under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees." 2d. Persons who "may have settled said lands with bona fide intent to secure title thereto by purchase from the State or corporation."

In determining just what acts of the claimants of these lands under the law, or what conditions precedent to an enjoyment of the rights and privileges guaranteed to claimants thereunder, must appear, it becomes necessary to examine not only the act itself, but the circulars and instructions of the company holding the lands under the granting act of Congress, issued from time to time in the regular course of its business, and in pursuance of its policy in reference to the settlement of the same, which circulars it is reasonable to presume the draughtsmen of the act of Congress cited, had in mind in the preparation of said act, and that Congress had in view in its efforts to afford adequate protection for claimants of these lands under the changing conditions affecting the same.

To that end, I herewith quote in full a circular issued by the land department of the Northern Pacific Railroad Company March 16, 1891, and on file in this suit. Said circular appears to be a concise *résumé* of said policy, as previously announced and given wide publicity by said company, and is as follows:

[Paul Schulze, Land Department—Western District, General Land Agent. Geo. P. Eaton, Asst. General Land Agent.]

NORTHERN PACIFIC RAILROAD CO.,

Tacoma, Wash., March 16, 1891.

To whom it may concern:

This certifies that on the twelfth day of October, 1871, the Board of Directors of the Northern Pacific Railroad Company passed a resolution inviting settlement and improvement of the agricultural lands of said company, prior to their being offered for sale, with the assurance that such settlers or improvers, as soon as the land should be appraised and ready for sale, would have "the first privilege of purchasing them upon the regular terms of sale and at the regular prices of such lands in such localities, which prices will be fixed without reference to the improvement:

"Provided, such person shall file in the land office of said company in the district where said lands lie, written notice of such settlement, and shall accept the privilege upon the condition that when the prices of the lands are fixed, and notice thereof is sent to his residence or post-office address by the company's land agent through the post-office or otherwise, the said person will, within ninety days from the date of such notice, enter into a regular contract with the company for purchase of the lands, and if he fails to do so, the company may sell the lands to any other person."

"Before, however, any timber can be cut on the company's lands, there must be an absolute purchase of the lands or timber, or a special contract authorizing the timber to be cut."

"That said resolution did not apply to coal or iron lands nor to lands chiefly valuable for timber, nor to lands suitable for town or manufacturing sites, nor, in regions where water is scarce, to lands containing springs or other natural supply, where it shall be for the interests of settlers at large that such water privileges shall not be exclusively held by any individual, nor to lands required for the use of the company in connection with the operation of the road."

That subsequently, to wit: on the fourth day of January, 1878, another resolution to the same effect was passed by the said board of directors;

That wide publicity was given to said resolutions with the object of attracting immigration and securing the improvement and cultivation of the agricultural lands of the company, thereby creating traffic for the road in advance of its construction;

That actual settlement on the land was not an essential requirement, but bona fide improvement was a prerequisite to securing any rights thereunder;

That in accordance with the terms of said resolution a large number of applications were filed in this office by settlers and others desiring to improve the lands of the company not in market; that in June, 1882, the policy of grading the lands of the company prior to offering the same for sale was adopted, and the practice of receiving and noting such applications was thereupon discontinued;

That thereafter the records and files of former applications received less attention and in the course of time and owing to the several removals of the office, became to some extent mutilated, destroyed, misplaced, confused and unreliable, as the examiner's notes would thereafter be relied upon principally for information as to parties in possession, nature of improvements, etc., when the lands should be offered for sale;

That the policy of allowing persons to go on and improve such lands was nevertheless continued, and they were encouraged in so doing;

That were the lands embraced in the forfeiture provisions of the act of September 29, 1890, to be offered for sale by the company, persons now in possession or owning valuable improvements thereon, would be, under our existing policy and practice, accorded a preference right of purchase, and would be notified and allowed ninety days to enter into contract for the purchase of the same, in accordance with the terms of said resolution;

That the resolution referred to was regarded by me and by my predecessors and all connected with the office, and the public was frequently so informed by publication, correspondence and otherwise, as constituting a general license and invitation to all persons to go upon and improve the agricultural lands of the company prior to their being offered for sale, on the assurance that preference right of purchase would be accorded to persons found in possession, or having valuable improvements thereon, when land was placed on the market;

That frequent applications have been made to me for certified copies of filings and records affecting the lands forfeited by said act, which information cannot be furnished with any reliability or certainty, nor without great labor and expense;

That this certificate is given in lieu of such information as indicating the policy and practice of the company as regards these lands and the nature of the license under which many have gone upon and improved lands to which they are now seeking to acquire title under the provisions of said act of September 29, 1890.

PAUL SCHULZE,

General Land Agent.

It will be observed from this circular that prior to January 4, 1878, persons desiring to purchase any of said company's lands, were required to file in the said office of said company, in the district in which the particular tract desired was situated, notice of settlement.

In the case at bar, it appears that one Patrick Russell made application to said company to purchase the land in controversy, May 20, 1878, and that he had been in possession of said land for several years previous thereto. In answer to said application to purchase, he received from said company a postal card without date, which is as follows:

NORTHERN PACIFIC R. R. LAND DEPARTMENT, PACIFIC DISTRICT.

Your application to purchase
 Sec. 1.....T. 7.....N.....R.....35 E.....has been received and placed on file.

Before any timber can be cut on the above described land, except that used in the improvement of the same, there must be an absolute purchase of the land or timber or a special contract authorizing the timber to be cut.

Bona fide settlement, or improvement of such character as will be evidence of your intention to purchase, is necessary before any right by virtue of your application is obtained.

Lands valuable for any other than strictly agricultural purposes are, at the option of the company, reserved.

SAM'L A. BLACK,

Gen'l Supt. and Asst. Land Commissioner.

It is contended by counsel for the defendants, and your office has so held, that this card does not possess any of the elements of a license, and conclude for that reason that the said Russell was not in possession of said land under license from said company.

It is true that the card itself is not such an instrument as comes within any authoritative definition of the term license, but it is evidence of the existence of a license to the said Russell to occupy and improve said land, inasmuch as it recognized the fact that the said Russell was in possession of the same, and undertakes to advise him of what acts are necessary to acquire title to said land, and is an acknowledgment by implication of the fact that the circulars of said company previously issued constituted a general license to all persons to take possession of and improve said lands on the condition prescribed therein.

License as a term of real estate law is an authority to do a particular act, or series of acts, upon another's land, without possessing any estate therein.

"In popular understanding a permission to do something which without the license would not be allowed. This is also the legal meaning." (*Youngblood v. Sexton*, 32 Mich., 419), and it may be "by specialty, by parol or by implication from circumstances." See *Anderson's Law Dictionary*, Title License.

The conditions under which the said Patrick Russell took possession of this land, fill the full measure of these definitions of a license, and if it cannot be held that the circulars of the company hereinbefore set out, operated as a parol license to the said Russell to take possession of and improve said land, no one will deny that a license did exist by necessary implication from the surrounding circumstances. It is therefore held that the said Russell had a license from said company to enter upon and take possession of said land for the purpose of making improvements thereon, and under guarantee of title from said company, after the performance of certain conditions precedent, as set forth in the circular hereinbefore quoted.

It is further insisted by counsel, and not passed on by your office,

for the reason that it was not necessary in view of the previous conclusion that there was no license, that a license is a personal right, and assuming that the said Russell held such a license as was contemplated by the act quoted, the same was not assignable, and that the contestant acquires no rights thereunder, by reason of his purchase from Russell.

It appears from the evidence that the contestant came into possession of the land in controversy in September, 1878, by purchase for a valuable consideration, of the improvements of the said Patrick Russell's license, and received the said Russell's written relinquishment of his right to the land, and also the postal card on file in this suit.

It is true that as a rule a license is of a personal character, and not the subject of assignment, but the rule is that a license, if coupled with an interest, is assignable, and, as has been seen in this case, the licensee Russell had acquired by reason of his improvements, a valuable interest of which he could not have been deprived by the licensor, and such an interest, coupled with the license, was the subject of assignment, and carried with it all the rights and privileges of the original licensee under the license.

It further appears from the record herein that the contestant was in possession of the land in controversy, if in possession at all, through an agent, and this brings us to a consideration of the statute hereinbefore cited.

As has been already seen, the requirements of the first class of persons under the third section of said statute, are met by "possession under deed, written contract with, or license from said company", and by reference to said circular hereinbefore quoted, it appears "That actual settlement on the land was not an essential requirement, but bona fide improvement was a prerequisite to securing any rights thereunder."

Assuming that said statute was intended as a remedial one, it goes without argument in the light of this circular, that actual settlement was not a prerequisite to the enjoyment of the benefits conferred by said statute, but waiving the question as to whether said statute was remedial or not, and assuming that by "possession" is meant actual possession, it by no means follows that actual settlement is required to constitute actual possession. "Actual possession as much consists of a present power and right of dominion as an actual corporal presence." *Minton v. Burr* (16 Cal., 107, 109). "By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation—by a substantial inclosure—by cultivation or by appropriate use, according to the particular locality and quality of the property." *Coryell v. Cain* (16 Cal., 567, 573).

"Actual possession of land is the purpose to enjoy, united with, or manifested by, such visible acts, improvements or inclosures as will give to the locator the absolute and exclusive enjoyment of it." *Stamfinger v. Andrews* (4 Nev., 59, 63).

"It is actual also where one having the title, is in possession of lands by his tenant, agent or steward." *Fleming v. Maddox* (30 Iowa, 240).

The contestant in the case at bar had such a title as would have been enforceable in a court of equity. The Northern Pacific Railroad Company was the legal title holder previous to the forfeiture act, (see decision of the supreme court in the case of *Schulenberg v. Harriman*, 21 Wall., 44) and if the agreement between the said company and contestant's assignor Russell was ever within the statute of frauds, which is by no means clear, in view of the circulars of said company, it was taken out of the statute by the part performance of the licensee, proven by the record herein.

It is therefore held, under the facts, as proven by the preponderance of the testimony herein, that the contestant was in possession of the land in controversy at the time of the passage of the forfeiture act of September 29, 1890, under license from the Northern Pacific Railroad Company, executed prior to January 1, 1888, within the meaning of said act, and is entitled to the preference right to purchase the same.

The decision appealed from is therefore reversed, and the same remanded for proceedings consistent with this decision.

SCHOOL LANDS—INDEMNITY—DOUBLE MINIMUM LAND.

THE STATE OF OREGON.

The words "other lands equivalent thereto," found in the school grants to the several States and in the indemnity act of 1826, and the words "other lands of like quantity," used in the indemnity act of 1859, and in the codification thereof in section 2275, R. S., are held to mean the same as the phrase "other lands of equal acreage" employed in the amendment of said section by the act of February 28, 1891, and it therefore follows that the State is entitled to select, for lands lost in place, other lands, acre for acre, regardless of price, whether single minimum or double minimum.

The case of the State of California *v. Smith*, 5 L. D., 543, overruled.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 5, 1894. (F. L. C.)

I have considered the appeal of the State of Oregon from your office decision of May 16, 1892, affirming the action of the register and receiver, at Lakeview, Oregon, rejecting its application to select as indemnity for certain school lands, in section 16 and 36, lost by reason of the Klamath Indian reservation, the following tracts, to wit: lots 1 and 2 and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 4; lots 2 and 4, Sec. 18; and lots 2 and 3, Sec. 30, T. 40 S., R. 6, E., W. M., Lakeview land district, in said State, embracing in the aggregate 415.49 acres.

The ground of the rejection was that the lands selected are within the limits of the grant to the Oregon and California Railroad, under

the act of July 25, 1866 (14 Stat., 239), and are consequently double minimum lands; whereas the lands lost and for which indemnity is asked are in sections not within the limits of any railroad grant, and as a result are single minimum lands.

The State, through its attorney, assigns error "in holding that the State of Oregon is not entitled to select land once held at double minimum price in lieu of any losses of school land."

In a brief subsequently filed, it is asserted that "lots 1 and 2 and the S. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 4 of the lands above described are not within the granted limits of the Oregon and California, or any other railroad," and I am advised, upon inquiry at your office, that its records verify this averment. It would therefore seem that the rejection of the application for the reason given was erroneous and inadvertent, in so far as it related to the tract last above described. The remaining tracts are within the granted limits of the Oregon and California railroad, and as to them the issue is sharply presented, whether under the school land grant what is known as double minimum land can be taken as indemnity for single minimum lands lost in sections 16 and 36.

This question was before the Department in 1887, in the case of the State of California *v.* Smith, in which it was considered at some length (5 L. D., 543), and the conclusion was reached that the term "lands of like quantity," used in the act of February 26, 1859 (11 Stat., 385), and in Sec. 2275 of the Revised Statutes, which embodies the same provision, "refers to the *character* and quantity of the lands lost, and that the State is not entitled to select double minimum lands in lieu of single minimum lands lost in place."

The case at bar has been orally argued before me by the attorney for the State and in said argument it was earnestly contended that the construction of the law, as enunciated in the decision of 1887, is erroneous, but that if it be conceded, for the purpose of the argument, that it was correct as the law then stood, it is not now the law, in view of the act of February 28, 1891 (26 Stat., 796), which is an amendment of sections 2275 and 2276 of the Revised Statutes, and which counsel contends is in the nature of a codification of the preceding laws relating to the grants of lands for public school purposes.

The same contention is pressed in elaborate briefs filed by the attorney for the State, and also in brief filed by the attorney for the State of Idaho, who has asked and been permitted to file argument, on the ground that the State which he represents is deeply interested in the question at issue.

In this connection, a review, in outline of congressional legislation in the way of grants for public school purposes, will not be inappropriate.

The first school grant was that to Ohio in 1802, by section 7 of the enabling act of April 30, of that year, which provided, among other things:

That the section, number sixteen, in every township, and where such section has been sold, granted, or disposed of other lands *equivalent thereto*, and most contiguous

to the same, shall be granted to the inhabitants of such township, for the use of schools. (2 Stat., 175.)

This grant, in its language, furnished a model for all subsequent grants of school lands to states. They were all in substantially the same terms, except that in the later grants, beginning with that to California, by section 6 of the act of March 3, 1853 (10 Stat., 244), sections sixteen and thirty-six were dedicated to school purposes. The words relative to indemnity for lands lost to the several grants to the states are the same in all the grants. They are "other lands equivalent thereto," that is, equivalent to the lands in sections sixteen or thirty-six lost by sale or other disposal. The latest grant is that in section 4 of the act of July 10, 1890 (26 Stat., 222), providing for the admission of the State of Wyoming, where the same words "other land equivalent thereto" are used with reference to indemnity school lands,

The general indemnity act of May 20, 1826 (4 Stat., 179), employs the same words.

The act of February 26, 1859 (11 Stat., 385), appropriates, in lieu of school lands lost in place, "other lands of like quantity."

Section 2275 of the Revised Statutes, which embodied in part the provisions of the act of 1859, *supra*, used the same words.

The act of February 28, 1891 (26 Stat., 796), entitled "An act to amend sections 2275 and 2276 of the Revised Statutes of the United States, providing for the selection of lands for educational purposes, in lieu of those appropriated for other purposes," uses, with reference to indemnity lands, in amended section 2275 of the Revised Statutes, the words "other lands of equal acreage are hereby appropriated and granted, and may be selected," etc.

In addition to allowing indemnity for lands lost by settlement prior to survey, said section also specifically allows indemnity "where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States."

The next inquiry which presents itself in the consideration of this case is: What are double minimum lands as distinguished from single minimum lands, and what gave rise to the distinction? It is well understood that the latter are those which, if disposed of for cash, or its equivalent, are to be paid for at the rate of one dollar and a quarter per acre, while the former are held at two dollars and a half per acre.

The government has from time to time made grants of land to states or corporations to aid in the construction of canals, wagon roads, and railroads. These grants were usually of alternate sections with specified lateral limits, along the line of the canal or road to be constructed, and the reserved sections, or those remaining to the United States within such lateral limits were, by the terms of the granting acts, to be disposed of as double minimum lands, the purpose, without doubt, being to reimburse the government the value of the granted lands.

That is, within certain limits it granted, say the odd sections which were single minimum lands, and raised the price of the remaining even sections to double minimum, thus at the same time benefiting the grantee and saving itself whole.

Furthermore, the building of the roads induced settlement along their lines by those who, because of the advantages which the construction of the roads gave, were more willing to pay double minimum price for lands thus situated than single minimum without the roads. The scheme at the same time operated to open up and develop large portions of our country hitherto practically unknown, and so the government, the settlers, and the roads were benefited.

As long ago as May 24, 1826 (4 Stat., 305), Congress made a grant to the State of Ohio to aid in the construction of a canal. The grant was of alternate sections within specified limits, and the reserved or remaining sections were not to be sold "for less than two dollars and fifty cents per acre."

The first railroad grant was that of September 20, 1850 (9 Stat., 466), for the benefit of the Illinois Central Railroad. This grant in its general features seems to have served as a model for all subsequent railroad grants. With regard to the sections within the limits of the grant geographically, but not granted, the act provided:

That the sections and parts of sections which by such grants shall remain to the United States within six miles on each side of said road and branches shall not be sold for less than double the minimum price of the public lands when sold.

The same language is used in the act of July 25, 1866 (14 Stat., 239), which enhanced the value of the lands here in question.

In addition to the double minimum provisions thus contained in the several railroad grants, with reference to the lands within granted limits remaining to the United States, is the general provision contained in section 2357 of the Revised Statutes, which, after stating that the price of offered public lands shall be one dollar and twenty-five cents an acre, adds the proviso:

That the price to be paid for alternate reserved lands along the line of railroads within the limits granted by any act of Congress shall be two dollars and fifty cents per acre.

An exception was made to this proviso by section 3 of the act of June 15, 1880 (21 Stat., 237), of lands then subject to entry and which had been put in the market at two dollars and fifty cents per acre prior to January, 1861, by reason of the grant of alternate sections for railroad purposes. These were reduced to one dollar and twenty-five cents per acre.

Further exception is also to be found in section 4 of the act of March 2, 1889 (25 Stat., 854), entitled "An act to withdraw certain public lands from private entry, and for other purposes."

The pre-emption law as it stood at the date of its repeal (March 3, 1891, 26 Stat., 1095,) allowed settlement upon and entry of one hundred

and sixty acres within the limits of railroad grants, at the double minimum price of two dollars and fifty cents per acre.

Both the private cash entry law (except as to Missouri) and the pre-emption law having been repealed by the two acts last above cited, there is little left upon which to base a distinction between single minimum and double minimum lands as to cash price.

The homestead law of May 20, 1862 (now section 2289 of the Revised Statutes) permitted the entry of one hundred and sixty acres of single minimum land, but only eighty acres of double minimum lands could be entered by any one person.

By the act of March 3, 1879 (20 Stat., 472), Congress enlarged the homestead privilege so as to allow the entry of one hundred and sixty acres within railroad limits, thus wiping out another distinction theretofore existing between what are termed single minimum and double minimum lands.

We, therefore, find that as the laws providing for the disposal of the public lands now stand, there is little left on which to base a practical distinction between the two classes of land mentioned, and the theory that in making the railroad grants it was the purpose of the government to reimburse itself by charging double price for the alternate sections remaining to it within granted limits has been gradually superseded by a policy substantially wiping out all distinction.

If there be room for doubt as to the proper interpretation of the laws under consideration, pertaining to the school grants, the growing liberality in congressional legislation with reference to the public domain, as illustrated by the foregoing recital, would warrant, if not call for, that construction which would be in the same direction.

The early school grants, commencing with that to Ohio in 1802, were made during a period when all public lands were disposed of at one price, such a thing as double minimum lands being unknown. Indeed, such was the condition in Oregon at the date of the school grant to her in 1859. There were in said State at that date no double minimum lands, there having been no grant of lands within her bounds, calling for a classification of public lands as to price.

The words in the grant of school lands to Oregon, in the act of February 14, 1859 (11 Stat., 383), "other land equivalent thereto," must therefore mean equivalent *in quantity*. They mean this or nothing, since at that time only one price—single minimum—was known.

The same condition existed generally when the school indemnity act of May 2, 1826 (4 Stat., 179), was passed, containing the same words, "other land equivalent thereto." Hence, there, as in the Oregon grant, they must have referred to quantity, and not to price. If this be true, then the act of 1826, the grant to Oregon of 1859, and the act of February 26, 1859, afterwards incorporated in part into section 2275 of the Revised Statutes, all mean just what the latter and the act from which it is derived say, viz: "other lands of like quantity," and do not

differ in meaning from the language "other lands of equal acreage," used in the act of February 28, 1891, amending section 2275 of the Revised Statutes.

The words last above quoted occur no less than three times in the act of 1891, thus leaving no doubt that they were used with the utmost deliberation and with a distinct purpose. They are plain and unambiguous, and a statute so worded must be construed according to its terms. Said act of 1891 being incorporated into the Revised Statutes as a part thereof, may properly be regarded as a codification of then existing law relative to school indemnity lands, as well as amendatory of sections 2275 and 2276 of the Revised Statutes. It manifestly did not purport to enlarge the school grant, nor can it by implication be construed to do so. Its language, therefore, where it is found to be more concise and certain in its meaning than that on the same point in previous legislation, must be taken as legislative interpretation of such previous law.

Applying this principle, the words "other lands equivalent thereto," found in the grants to the several states and in the indemnity act of 1826, and the words "other lands of like quantity," found in the act of 1859 and in the codification thereof in section 2275, Revised Statutes, must be held to mean the same as the words "other lands of equal acreage," used three times in amended section 2275, Revised Statutes.

It is to be observed that in all these laws there are no words of exception, save in the last cited, and that is of mineral land, so it follows that the selections may be made of any public lands subject to disposal by Congress. Mineral lands had previously been excepted by construing the mineral laws *in pari materia* with the school grants, but now they are specifically mentioned in amended section 2275, R. S.

The power of Congress to provide for the disposal of the remaining alternate sections within railroad grants can not be disputed, for they are public lands, and as such subject to its disposal. In fact, they have been disposed of and are being disposed of under the public land laws, so, if the intent be clear, as announced in the laws providing for school indemnity selections, and I think it is, that the law was meant to allow selections of school lands for lands lost in sections sixteen and thirty-six, acre for acre, regardless of price, whether single minimum, or double minimum, then it follows that lands within the granted limits of a railroad are subject to selection, if not mineral.

I am aware that this line of reasoning will bring me to a conclusion in the case at bar at variance with the rule which has for some years prevailed in the Department in the administration of the school indemnity laws.

The most fully, and apparently the most carefully, considered case on the subject is that of Acting Secretary Muldrow, under date of April 4, 1887, in the case of the State of California *v.* Smith (5 L. D., 543). That case grew out of an attempt by the State of California to select

double minimum lands in lieu of single minimum lands lost to the school grant, and the Department held that it could not be done.

Without referring to that case in detail, I am, for the reasons herein given and especially because Congress has, in the act of February 28, 1891, amending and codifying sections 2275 and 2276 of the Revised Statutes, used language plain and unambiguous in the nature of legislative interpretation of previously existing law, to the effect that the only thing to be considered is the question of acreage, led to conclude that the general doctrine announced in the Smith case is error.

There is one decision of the supreme court of the United States which was not referred to by counsel for the State, and which upon its face might appear to militate against the conclusion foreshadowed above. I refer to the case of *United States v. The Missouri, Kansas and Texas Railway Company* (141 U. S., 358), decided October 19, 1891. In that case the Missouri, Kansas and Texas Railway Company attempted, by virtue of the act of July 26, 1866 (14 Stat., 289), to select indemnity land from the even numbered sections within the place limits of the overlapping grant of odd sections to the Leavenworth, Lawrence and Galveston Railroad, and the court held that the Missouri, Kansas and Texas Company is not entitled to have indemnity lands from the even numbered sections within the place limits of the Leavenworth, Lawrence and Galveston Railroad.

The original grant for the benefit of what is now known as the Leavenworth, Lawrence and Galveston Company was by the act of March 3, 1863 (12 Stat., 772), of every alternate section of land designated by odd numbers for ten sections in width on each side, etc.

The 2d section of the grant provided that—

The sections and parts of sections of land which by such grant shall remain in the United States within ten miles on each side of said road and branches shall not be sold for less than double the minimum price of the public lands when sold, etc.

It further provided for pre-emption cash entry of said lands remaining to the United States at the double minimum price of two dollars and fifty cents per acre. It also allowed homestead settlers to take said lands in quantity not exceeding eighty acres upon proof of five years residence and cultivation.

The grant for the benefit of what is known as the Missouri, Kansas and Texas Company was by the same act and on the same conditions.

The act of July 1, 1864 (13 Stat., 339), mentioned in said supreme court decision, simply extended the Neosho Branch of the Missouri, Kansas and Texas Railroad from Emporia northward to Fort Riley, and the act of July 26, 1866 (14 Stat., 289), was a further extension for the benefit of said Missouri, Kansas and Texas Co. The last named act provided for the selection from the public lands of the United States, nearest the sections lost, of a like quantity of land within certain limits. It also contained a proviso:

That any and all lands heretofore reserved to the United States by any act of

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Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever, be and the same are hereby reserved from the operation of this act, etc.

The court ruled on these words of express reservation (which in the opinion are italicized), that the Missouri, Kansas and Texas Company was precluded from going within the granted limits of the Leavenworth, Lawrence and Galveston road to make indemnity selections.

As I understand the supreme court decision in the case of the Missouri, Kansas and Texas Company, it in no wise conflicts with the views herein expressed. There were express words of exception of lands reserved *for any purpose whatever*. Here, it is "other lands of like quantity" without words of reservation or exception, or, as the most recent legislation has it, "other lands of equal acreage."

Either the view herein expressed is correct, or for years the Department has been wrong in allowing double minimum lands to be selected for double minimum school lands lost, for, if there is inhibition against selecting school indemnity lands in alternate sections remaining to the United States within the limits of a railroad grant, such inhibition applies with the same force whether the lands lost be double minimum or single minimum.

In view of the growing liberality of Congress in the disposal of the public lands, I can not believe that it intends any backward step to be taken, particularly with respect to the grants for the benefit of the public schools, nor do I think that the supreme court would, in a case like that before me, make a ruling which would involve any retrograde step, or that it would, if passing on the laws here under consideration, reach a conclusion different from that arrived at herein.

After a full and careful consideration of the important question raised in the case at bar, I arrive at the conclusion that the selection of the double minimum lands described herein in lieu of single minimum lands lost to the school grant in place may, and under the law ought to, be allowed.

Your office decision of May 16, 1892, is accordingly reversed.

The decision of the Department in the case of the State of California *v. Smith* (5 L. D., 543), is, in so far as it is in conflict herewith, overruled.

ARID LANDS—WITHDRAWAL—ACT OF OCTOBER 2, 1888.

AUSTIN *v.* THOMPSON.

A tract of land embraced within a desert entry at the date of the passage of the act of October 2, 1888, is excepted by such entry from the operation of the general withdrawal declared by said act for reservoir purposes.

Land so excepted from the operation of said act and subsequently entered under the timber culture law is not thereafter subject to a specific withdrawal under said act.

Secretary Smith to the Commissioner of the General Land Office, April
J. I. H. 5, 1894. J. I. P.

On September 26, 1891, Charles B. Austin filed with the local office at Las Cruces, New Mexico, application to contest timber culture entry No. 640, made by Jesse E. Thompson December 13, 1888, and embracing the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lot 2, Sec. 12, T. 26 S., R. 2 E., Las Cruces land district. Said application was accompanied by an application to enter said lands under the homestead laws.

The tracts in question are within the limits of the withdrawal made by your office August 5, 1889, for a reservoir site, under the act of October 2, 1888 (25 Stat., 526). Said application to contest was forwarded to your office for instructions which, by letter "H" of October 26, 1891, directed that action on said application be suspended pending a departmental decision regarding the permanent selection of lands in said township for the El Paso reservoir site.

On inquiry by the local office, dated May 13, 1892, as to whether said decision had been made, your office, by letter "H" of June 8, 1892, replied that—

the records of this office do not show that any permanent selection has been made in said township, and the lands temporarily selected under the survey will remain suspended until after survey of a permanent site and approval thereof by the Department.

The T. C. E. No. 640, in question, being made subsequent to the passage of the act of October 2, 1888 (U. S. Stat., Vol. 25, p. 526), is subject to said temporary selection and no contest proceedings can be allowed against said entry while such suspension remains in force.

Austin's appeal from the holding in the last paragraph above quoted brings the case here.

It is contended by Austin in his appeal that the holding of your office is error, for the reason that all of said Sec. 12 was segregated from the public domain by desert land entry No. 115, dated January 9, 1883, and that said entry was followed by final desert land entry No. 21, dated September 20, 1884. That in pursuance of this view, a part of said Sec. 12 has been patented to Austin, by private cash entry No. 1834, based on a filing of even date with that of timber culture entry No. 640, *supra*.

The records of your office show that at the date of the passage of the act of October 2, 1888, *supra*, all of said Sec. 12 was included in desert land entry No. 115, made January 9, 1883, upon which final certificate No. 21 was issued September 20, 1884; and that on November 2, 1888, one month subsequent to the passage of said act, said entry was canceled. Now, the question arises, is said Sec. 12 exempt from the operation of the act of October 2, 1888, by reason of its being segregated from the public domain at the date of the passage of said act.

In the case of *Wilcox v. Jackson* (13 Peters, 513), it was held that when a tract of land is once appropriated to any purpose it from that

moment is severed from the mass of public lands, and that no subsequent law or proclamation would be considered to embrace it or operate upon it, although no reservation were made of it. This rule has been uniformly followed by the Department. (See Forest Reservation, 12 L. D., 86.)

It follows then that Sec. 12, *supra*, having been segregated from the public domain at the date of the passage of the act of October 2, 1888, is excepted from the operation of that act, and cannot be affected by any proceedings under it, which seek to appropriate it for reservoir purposes.

This conclusion would alone necessitate the reversal of your office decision, *supra*. But in addition thereto, your attention is called to the act of August 30, 1890 (26 Stat., 371, at p. 391), which expressly repeals so much of the act of October 2, 1888, "as provides for the withdrawal of the public lands from entry, occupation and settlement, and all entries made or claims initiated in good faith, and valid but for said act, shall be recognized," etc.

Therefore the lands embraced in timber culture entry No. 640, being a part of said Sec. 12, are *not* subject to said temporary selection for said reservoir purposes, and the contest initiated against said entry is a legitimate action and should be allowed to proceed.

Your office decision of June 8, 1892, is therefore reversed, with instructions to direct the local office to order a hearing on the affidavit of contest filed by Austin, under the regulations prescribed by law and the rules of the Department.

MILLS v. DALY.

Motion for rehearing in the case above entitled (see 17 L. D., 345) denied by Secretary Smith, April 5, 1894.

ARID LAND—RESERVOIR SELECTION—ENTRY.

AMANDA CORMACK.

Entries and filings after the passage of the arid land act of October 2, 1888, and prior to the passage of the act of August 30, 1890, were made at the claimant's own risk; and the Department has no authority to afford relief where settlements were made on land selected for irrigation purposes after the passage of the first act, and prior to the second, if such settlements are not protected by the provisions of section 17, act of March 3, 1891.

Secretary Smith to the Commissioner of the General Land Office, April 5, 1894. (J. I. H.) (S. C. T.)

Amanda Cormack made settlement on the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 21, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 28, T. 20 N., R. 5 E., Helena land district,

Montana, on the 25th of October, 1888, and resided thereon continuously until the 30th of April, 1890, when she made final proof, which was accepted on the 9th of May of that year, and final receipt and certificate issued to her. Her improvements at that time were valued at \$427.

On the 10th of May, 1890, she obtained a loan of three hundred dollars from the Northwestern Guaranty Loan Company, and executed and delivered to said company a mortgage for that amount upon the land above mentioned, as security for said loan. Prior to making such loan and taking such mortgage, the company ascertained from the records in the proper office in Cascade county, Montana, in which county said lands were situated, that her record title to the land was perfect, without flaw or cloud of any kind whatever. The mortgage was made and taken in good faith, is still unpaid, and the mortgagor is financially irresponsible.

On January 9, 1891, your office informed the register and receiver at Helena, that the land in question, with other lands, was reserved for the Box Elder reservation system, and that the pre-emption cash entry of Cormack was therefore held for cancellation as illegal. She was so advised, and allowed sixty days for appeal. The case is before me upon an appeal by Cormack, and a petition by the North Western Guaranty Loan Company, which sets forth the facts already recited relating to the loan, mortgage, etc., and praying "that a time and place be fixed for a hearing on this petition, and that your petitioner and the said Amanda Cormack as well, may be granted an opportunity to show cause why the entry of the said Amanda Cormack may not be canceled."

In the appeal of Cormack, it is alleged that your office erred in holding that the act of Congress approved October 2, 1888, withdrew this land from settlement from its date; in holding that the act of Congress approved August 30, 1890 did not repeal the act of October 2, 1888 in all cases where the land had been entered prior to the actual withdrawal for the Box Elder reservation system; in not holding that the withdrawal for the Box Elder reservation system could not take effect until after the withdrawal of July 8, 1890 had been received in the local office, and in holding that the reservation for the Box Elder reservation system applied to the land embraced in this pre-emption entry which had segregated it long prior to the withdrawal of July 8, 1890.

The act of Congress of October 2, 1888 (25 Stat., 526) reserving lands for reservoirs, canals, ditches, etc., for irrigating purposes, provided that "all lands which may hereafter be designated or selected" for such purposes, "are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law."

There can be no doubt but that act took effect at the date of its pas-

sage, and that it applied to all lands which might thereafter be designated or selected until further provided by law. Further provisions by law were made in the act of Congress of August 30, 1890 (26 Stat., 391) which repealed so much of the act of October 2, 1888 as provided for the withdrawal of the public lands from entry, occupation and settlement,

except that reservoir sites *heretofore* located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites *hereafter* located or selected on public lands shall in like manner be reserved from the date of location or selection thereof.

Township 20 N., range 5 E., which embraces the lands in question was selected and recommended for reservoir purposes on the 8th of January, 1890, and by letter dated July 8, 1890, your office advised the local officers that it had been reserved for that purpose. Both of these events took place prior to the passage of the act of August 30, 1890, and while the act of October 2, 1888 was in force. The reservation therefore comes under the provisions of the act of 1888, and under the provisions of the act of 1890, as having been "*heretofore*" made, and not under the provisions of the latter act, relating to selections made after its passage.

Persons who made entries and filings after the passage of the act of October 2, 1888, and prior to the passage of the act of August 30, 1890, did so at their own risk, and this Department has no authority to afford them relief in cases where their settlement was made upon land which was selected for reservoirs, canals, ditches, etc., for irrigation purposes after the passage of the one, and prior to the passage of the other act.

The seventeenth section of the act of March 3, 1891 (26 Stat., 1095) provides that reservoir sites located or selected, and to be located and selected under the provisions of the act of October 2, 1888, and the amendments thereto,

shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding as far as practicable lands occupied by actual settlers at the date of the location of said reservoirs.

At the date of the location of the reservoir upon the land in question, said land was occupied by an actual settler, and should therefore be excluded from selection, unless it was "actually necessary for the construction and maintenance of reservoirs."

All the lands in sections 21 and 28 in township 20, have been released from the reservoir selection, and restored to the public domain, except the east half of the south-east quarter of section 21, and the east half of the north-east quarter of section 28. This release and restoration was made on the 13th of November, 1891.

By letter of March 29, 1892, your office transmitted to the Department a list of the lands selected for reservoir site No. 31, in the Helena, Montana district, from which it appears that the east half of the south-

east quarter of section 21, and the east half of the north-east quarter of section 28, are "actually necessary for the construction and maintenance of reservoirs." This includes three of the forties covered by the cash entry of Cormack, leaving only one of her forties, to wit, the north-west quarter of the north-east quarter of section 28, open to settlement and entry.

On the 12th of October, 1892, the Secretary of the Interior called the attention of the Director of the United States Geological Survey, to the fact that several parties had been allowed to make entries or filings on some of the lands included in said reservoir site No. 31, and requested him, if practicable, to exclude such tracts from the selection.

On the 3d of July, 1893, the Director of the Geological Survey, addressed a communication to the Secretary of the Interior, in which he acknowledged the receipt of the Secretary's letter in relation to said reservoir site No. 31, and also letters relating to several other sites, and stated that he had carefully re-examined the surveys relating thereto. The conclusion reached by him after such re-examination, was that the segregation recommended for site No. 31, and the several others named in his communication, "be confirmed for all parcels of land the titles to which still remain in the United States government." The sites to which this recommendation applied were Nos. 5, 6, 7, 10, 19, 24, 26, 27, 28, 29, 31 and 37 in Montana; Nos. 1, 5, 6, 7, 8, 9, 10, 11, 12 and 13 in Utah, and No. 1 in Idaho-Utah. In reference to sites Nos. 18, 20 and 25, in Montana, he recommended that the segregation asked for be disallowed.

The selection in the case at bar having been made in conformity with the acts of Congress, the Department is without authority to grant the relief demanded by Cormack, or to order the hearing petitioned for by the North Western Guaranty Loan Company, giving both Cormack and the said company "an opportunity to show cause why said entry of Amanda Cormack may not be canceled."

Your office decision of January 9, 1891, holding the pre-emption cash entry of Amanda Cormack for the north half of the northeast quarter of section 28, and the east half of the south-east quarter of section 21, made May 9, 1890, for cancellation, is modified so as to exclude from such judgment of cancellation the north-west quarter of the northeast quarter of section 28. As thus modified, the decision appealed from is affirmed.

GILMORE v. SIMPSON.

Motion for review of departmental decision of June 22, 1893, 16 L. D., 546, denied by Secretary Smith, April 5, 1894.

TIMBER LAND—APPLICATION—ADVERSE CLAIM.

PEASLEY v. WHITING.

The burden of proof rests upon a timber land applicant to show that the land applied for is subject to entry under the act of June 3, 1878, and to establish the invalidity of any adverse claim; and this rule is not changed by the appearance of a protestant when the applicant submits his final proof.

An adverse claim based on homestead settlement set up to defeat the right of purchase under said act, will be limited to the technical quarter section on which settlement and improvements are made, in the absence of an entry at the date of the timber land application, or actual notice of the settler's intention.

Secretary Smith to the Commissioner of the General Land Office, April 5,
(J. I. H.) 1894. (W. F. M.)

On August 7, 1890, Clarence L. Whiting made application to enter, under the timber and stone act, the SW. $\frac{1}{4}$ of section 20, township 18 N., range 3 W., within the land district of Olympia, Washington.

On the same day, August 7, 1890, Emerson D. Peasley made homestead application for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of the same section.

Both of these applications were rejected for conflict with the cash entry of John P. Tweed, made in 1883, but upon its having been made to appear to the local officers that Tweed's entry was canceled by your office on August 6, 1890, Whiting's timber land application was allowed on August 12, 1890; and thereafter, on August 18, Peasley again presented his homestead application and the same was also allowed.

Upon publication by Whiting of his intention to make final proof, Peasley filed his protest against its allowance for the land in conflict, to wit, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 20, alleging, first, that the land is more valuable for agricultural purposes than for timber; second, that he had settled and established a residence on the land on July 4, 1890, and, third, that the local officers having allowed him thirty days within which to appeal from their action in rejecting his homestead application, it was error on their part to allow Whiting's timber land application pending that delay.

A hearing was had on these issues, and pursuing the customary course, the case came before this Department on appeal from the decision of your office holding Whiting's entry for cancellation as to the tract in contest.

On August 19, 1893, a decision was rendered here reversing the judgment appealed from, and directing the acceptance of Whiting's final proof.

The case is brought to my attention again by a motion for review wherein there are set out seventeen several specifications of error.

Objection is strenuously urged against the following language of the decision:

Peasley is the contestant in the case and has of course the burden of proving his allegations. He should, therefore, have shown by a preponderance of the evidence that he had established and maintained a bona fide residence on the land.

After a careful review of the authorities bearing upon the question I have reached the conclusion that the expression quoted is not a correct statement of the law. It appears to have been consistently held that it devolves upon the timber applicant to establish by a preponderance of testimony that the land sought to be entered is within the excepted class, and he must show, therefore, that it is chiefly valuable for its timber and unfit for agricultural purposes, is unappropriated, uninhabited and without improvements. These facts must affirmatively appear, and the burden is upon the applicant to prove them.

"The claimant must prove that the land is unoccupied and without improvements." *Hughes v. Tipton*, 2 L. D., 334.

"The burden of proof is upon the timber applicant to show the invalidity of the pre-emption claim." *Merritt v. Short, et al.*, 3 L. D., 435. *Porter v. Throop*, 6 L. D., 691.

The burden is upon the timber applicant to establish the fact that there is no bona fide claim under any law of the United States. *Smith v. Buckley*, 15 L. D., 321.

I do not deem it necessary, however, to consider this, or any other of the numerous specifications of error, and the question is adverted to here merely and solely for the purpose of preserving the harmony and symmetry of the jurisprudence of this Department upon an important rule of practice. On August 12, 1890, the date of Whiting's application, Peasley had no entry of record, and therefore, the former had no notice of the latter's claim other than that afforded by implication from the fact of settlement; but it is a well established rule of this Department that "the notice given by settlement and improvement extends only to the technical quarter section upon which they are located." *Pooler v. Johnson*, 13 L. D., 134.

Peasley's claim, embracing one hundred and sixty acres, extends laterally across the section, being the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$. It is not denied that his improvements are on the latter tract, and that he has no improvements indicating an intention to claim the former; neither does the record disclose any actual notice to Whiting of such intention.

I have carefully read the reply brief of counsel in which it is strenuously contended that the rule here invoked has no application to entries under the act of June 3, 1878, but I find no precedent cited as authority for the contention; and, as an original proposition, I do not think it tenable.

The motion for review is therefore denied.

MINING CLAIM—PROTESTANT—CO-CLAIMANT.

MONITOR LODGE.

A co-claimant must protect his rights under the form of procedure provided for an adverse claimant.

Secretary Smith to the Commissioner of the General Land Office, April 5, 1894. (J. I. H.) (G. B. G.)

On July 27, 1892, James Carroll made mineral entry No. 40 for the Monitor Lodge claim, lot 163, Sitka land district, Alaska.

On August 6, 1892, George Harkrader filed his protest against the entry, alleging in effect that the said Carroll is the owner of but one-half of the said lode, as is shown by abstract of title, now on file; that the deed for said one-half interest was obtained by the said Carroll long after application was made, and while the same was being contested by other parties.

The case is before the Department on appeal of George Harkrader from your office decision of December 16, 1892, dismissing the said Harkrader's protest.

A protestant has no standing before the Department as a litigant, except he have an interest in the subject-matter of the controversy. See Bright *et al.* v. Elkhorn Mining Co. (8 L. D., 122); also Lucy B. Hussey Lode case (5 L. D., 93), and cases therein cited.

In the case at bar, the protestant claims the right to be heard by reason of his alleged co-ownership in the Monitor Lodge claim.

Section 2326 of the Revised Statutes, points out specifically the manner of procedure to establish an adverse mining claim under the law, and in the Grampian Lode case (1 L. D., 544), it was held that a co-claimant must protect his rights under the form of procedure provided for an adverse claimant.

I see no reason why your decision should be disturbed in the interest of the government. For the reasons hereinbefore stated protestant's appeal herein was improperly allowed, and the same is hereby dismissed.

SECOND CONTEST—RELINQUISHMENT—SETTLEMENT.

PENCE v. GOURLEY ET AL.

A contestant should not be allowed, on filing a relinquishment, to exercise the right of entry during the pendency of a second contest charging the speculative character of the first.

A contestant who holds a relinquishment and brings a contest against the entry covered thereby, charging the fact of relinquishment, acquires no preferred right, if he subsequently files said relinquishment and the entry is canceled; nor can he secure such right by settlement on the land prior to the cancellation of said entry.

Secretary Smith to the Commissioner of the General Land Office, April 5, 1894. (J. I. H.) (E. M. R.)

This case involves the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of sec. 28 T. 11, N., R. 3 W., Oklahoma city land district, Oklahoma Territory. The record shows

that on May 11, 1889, A. G. Blauvelt made homestead entry for the above described tract.

On October 17, 1889, Wm. Gourley filed contest affidavit against the above mentioned entry, charging that the entryman had executed, for a valuable consideration, a relinquishment of his entry and had asserted afterward no claim whatsoever to the land.

September 30, 1890, Thos. W. Pence filed a contest affidavit against the entry of Blauvelt setting forth the charge of abandonment and relinquishment of the entry by him and, further, that the contest filed by Gourley was initiated when the relinquishment was in his possession, and that the contest was speculative and intended to prevent others from securing any rights upon the land, until he, the said Gourley, could sell the relinquishment or hold the land until such time as suited him to make entry thereof.

Subsequently, on December 21, 1891, Gourley filed the relinquishment of the entryman and made homestead entry for the land in controversy, together with the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the same section.

At the hearing before the local officers, the contest of Pence was dismissed and the entry of Gourley allowed to remain intact, and, upon appeal, your office decision of July 29, 1892, sustained the action of the register and receiver. Upon further appeal the case is now before the Department for final adjudication.

An examination of the evidence discloses the following facts:

Gourley, with one Talbot, arrived in Oklahoma Territory about October 8, 1889, and shortly thereafter sought to secure a claim upon which to make entry.

Blauvelt's relinquishment of the land now in issue was bought by either Gourley or Talbot, about the middle of that month, the former asserting that it was bought by the latter and that a few days thereafter, it becoming necessary for him (Talbot) to return to Dakota, he purchased from Talbot the relinquishment; and this seems to be the view taken of the case by the register and receiver and your office. But I can not concur in the conclusions of fact heretofore reached in the case for the following reasons:

It is in evidence that Talbot, himself, says that the relinquishment was bought jointly by him and Gourley. The money (\$190) paid for the relinquishment was borrowed from one Munk by Gourley, and both Gourley and Talbot were present with Blauvelt when the relinquishment was negotiated, which was at that time turned over to Gourley, though, it is claimed, that before leaving the office he handed it to Talbot. On the same day that this relinquishment was made Gourley went to the local office and there filed a contest against the entry of Blauvelt—alleging relinquishment and abandonment—notwithstanding the fact that he was present when such relinquishment was bought by Talbot, as he alleges, and that he was an old friend and neighbor of Talbot's and had come with him from Dakota to Oklahoma. This does not

appear to be the conduct of a friend whom Talbot sufficiently trusted to have present at this negotiation, and it leads irresistibly to the conclusion that the relinquishment was in fact made to Gourley himself or to both Gourley and Talbot jointly.

The whole transaction shows that Gourley, and not Talbot, was the person who negotiated the matter; he borrowed the money from Munk, was present when the relinquishment was made, and it was to him the relinquishment was handed and not to Talbot, who subsequently returned to Dakota. It also shows that Gourley's remarks to Munk (as testified to by the latter) when he approached him in reference to borrowing the money, that he wanted it to buy out "the Californian" could not apply to Talbot who was from a different State.

Shortly after buying the relinquishment Gourley moved upon the land where he has resided since and made valuable improvements upon it.

These being the facts, it now becomes necessary to consider what is the legal conclusion to be drawn therefrom.

In the first place it is well here to note that the local officers were in error in allowing the subsequent homestead entry of Wm. Gourley pending the disposition of the second contest of Pence. In the case of *Ryan v. The Central Pacific Railroad et al.* (12 L. D., 11), it was held that "An application to make homestead entry can not be allowed for land embraced in a pending contest." In *Weir v. Manning* (13 L. D., 24), it was more specifically stated that "A contestant should not be allowed on filing the relinquishment of the entryman to exercise the right of entry during the pendency of a plea of intervention setting up fraud and collusion as against the contest."

These decisions are sufficient to establish that the entry of Gourley was improperly allowed to go on record, while the contest of Pence was pending. The questions now at issue are: First, whether the contest of Gourley gave him any rights to the land, and, Secondly, did his settlement inure to any legal advantage to him?

Upon the first question: In the case of *Butman v. Barrister* (13 L. D., 493), Assistant Secretary Chandler held:

That a contestant who is in possession of a relinquishment but for purposes of delay and speculation brings a contest against the relinquished entry on the ground of relinquishment and abandonment, and subsequently files said relinquishment, acquires no preference right on the cancellation of the entry.

In the *ex-parte* case of *Eva Brown* (3 L. D., 150), it was held that

Where one purchases of a timber-culture entryman his relinquishment, it may be made the basis of an entry by filing it with an application for the land, but it may not, by retaining it, become the basis of a contest by the purchaser.

The reason of this is apparent, inasmuch as the filing of a contest where one holds in one's hands that which makes the contest unnecessary, is a nullity and ought not, and does not, confer any rights upon the contestant, for the reason that the contest is not made in good

faith and is not for the purpose of securing the cancellation of the entry, as the relinquishment in his possession would, in itself if filed, secure that result.

Gourley's explanation of the reason why he retained in his possession this relinquishment is that he was desirous of using it as evidence to prove the truth of his allegations, and also, that it was his intention to make entry at the same time for the other tract of land which he subsequently did enter and which, at the time of his securing the relinquishment, was covered by the entry of another. This does not appear to me to be a valid excuse or a legal right. I know of no authority that justifies the withholding of land from entry for such purpose.

It thus being seen that Gourley secured no rights by reason of his contest and under his entry which was improperly allowed, the only remaining question to be disposed of is that of his settlement, improvements made by him, and his continuous residence upon the land. It can not be successfully maintained here that this gave him any title or right to the land, for the reason that at the time of his moving upon it it was covered by the homestead entry of another, and no settlement made under such circumstances can inure to his benefit.

My conclusions are, therefore, that the contest of Gourley was not made in good faith; that he was either the sole purchaser or that he was jointly so with Talbot, and it matters not for the purposes of this decision which was the case. He had such an interest in the relinquishment that his subsequent contest was not in good faith, and was not intended for the purpose of securing the cancellation of the entry, but could only have been initiated in order either to hold the land pending his sale of the relinquishment or, what is still more probable, until such time as suited him to make homestead entry for the tract.

For the reasons set out your office decision was in error and the same is accordingly reversed.

HOMESTEAD—SETTLEMENT—TENANT—ENTRY.

DOWNING v. CHAPMAN.

A claim based on settlement and cultivation cannot be initiated by one while holding public land as the tenant of another; but if the settler in such case makes entry of the land his rights may be regarded as legally initiated, as against the government, on the date of said entry.

Secretary Smith to the Commissioner of the General Land Office, April 5,
(J. I. H.) 1894. (G. B. G.)

I have considered the case of Frank R. Downing v. Thomas Chapman, on appeal of Downing from your office decision of August 23, 1892.

August 14, 1889, plaintiff Downing filed his declaratory statement for lot 4 and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 5, and lots 7 and 8 of Sec. 6, T. 35 N., R. 9 W., Durango land district, Colorado, alleging set-

tlement February 9, 1889: and on the same date Thomas Chapman made homestead entry for lot 3 and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said Sec. 5, and lot 7 of said Sec. 6, same township and range, alleging settlement October 15, 1888.

Downing submitted final proof of his claim October 9, 1889, against which Chapman protested, alleging priority of right in himself, and that Downing had left land of his own in the State to live on his pre-emption claim, and the same day the local officers rejected Downing's proof, for the reason that the land was reserved under circular of August 5, 1889; that claimant's right was initiated in violation of section 2260, Revised Statutes, he having removed from land within the State to take up his residence on this land; and that his actual residence had been insufficient.

On appeal from the decision of the local officers, your office held, March 11, 1891, that the land had not been reserved, and that Downing's residence had been sufficient, but affirmed said decision to the extent "that his claim was initiated in violation of section 2260, Revised Statutes," rejected the proof and held his declaratory statement for cancellation, as illegal.

Downing was notified of the decision, and on April 11, 1891, filed his waiver of appeal, relinquishment of his declaratory statement, and at the same time he filed affidavit of contest against Chapman's entry, together with his application to enter as a homestead the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and lot 4 of said Sec. 5, and lots 7 and 8 of said Sec. 6, alleging settlement March 27, 1889.

The allegations of the contest affidavit are in effect, as stated in the opinion appealed from, and are as follows:

That one George A. Newman held the land in dispute, under a defective survey and a D. S. filed by him July 26, 1886; that some time in 1886, Newman made a verbal lease of the land to Chapman, which was reduced to writing November 23, 1888; that on February 8, 1889, the contestant purchased of Newman the improvements and possessory right to the land, for which he paid the sum of \$800, Newman delivering to the contestant a relinquishment of his D. S. filing; that Chapman was present when said purchase was made, consented to the sale and the assignment of the lease, and accepted the contestant as his landlord; that the contestant and Chapman have held the relation of landlord and tenant ever since; and that Chapman had abandoned the land from August 18, 1890, to March 22, 1891.

A hearing was had, and on March 24, 1892, the local officers found for the contestant, and recommended the cancellation of Chapman's entry. The entryman appealed, and August 23, 1892, your office reversed the finding of the register and receiver, dismissed the contest, and held the entry intact, and the case is now before the Department on appeal of Downing, who assigns as error substantially, that your office erred in its findings of law and facts.

The question at issue under the facts, as disclosed by the record, is briefly: Has the contestant any legitimate claim to the land in controversy, and if not, could the claimant, having entered upon the land as

contestant's tenant, have initiated such an adverse claim as ought to be recognized by the government?

The material facts are:

1st. The contestee Chapman went on the land in the latter part of September, 1888, as a tenant of one George A. Newman, under a verbal lease, which was reduced to writing November 23, 1888, to continue to May 1, 1894.

2d. On February 8, 1889, the contestant Downing purchased of the said Newman, for the sum of \$800.00, the possessory right to the improvements on said land, together with the lease, and a relinquishment of Newman's declaratory statement filing, and Chapman was present when the purchase was made, consented to the sale and assignment of the lease, and accepted the contestant as his landlord.

3d. The preponderance of the testimony shows that contestant's intentions with reference to the land were of a speculative character, and that he did not want it for a home, it appearing that a lake therein would ultimately, in all probability, be valuable for reservoir purposes, and that it was the water the contestant wanted, rather than the land.

This later assignment of fact in effect disposes of the first question under consideration. If contestant's settlement was for speculative purposes he acquired no rights thereby, and it follows that he is entitled to no other consideration than the bare legal rights guaranteed to a contestant under the law, and his case must stand or fall on the alleged defaults of the entryman, "that Chapman had abandoned the land from August 18, 1890, to March 22, 1891."

On this point the evidence shows that said Chapman was absent for about seven months from the homestead on a visit to his mother in Ireland, who was sick; that he returned before the institution of the contest herein, and was living on the land at the time he was served with notice of contest. The evidence further shows that he had no intention of abandoning the claim, and while six months' absence is prima facie evidence of abandonment, I think it is fully explained, and not only explained, but cured by a return to the land prior to the initiation of contest.

It follows that appellant's case can not stand on this charge in his contest affidavit, and eliminates him from the contest.

It remains to be seen whether the entryman Chapman could acquire any rights as against the government by acts of such manifest bad faith towards his landlord. His residence, and cultivation of the land are all that the law requires, but he entered on the land under a lease, and there is no evidence that he had ever disputed his landlord's title or right, up to the time that he made entry of the tract. He did not therefore settle on the land with the intention of making it a home, and the question is, from a legal standpoint, could he disclaim the tenancy and assert right to the land so long as he remained in possession thereof?

In general the rule is that a tenancy once shown to exist will be presumed to continue so long as the tenant remains in possession, and while in possession the tenant cannot set up title contrary to that of the landlord. But, as has been seen in this case, the self-constituted landlord never had any right as against the government, and as only the government and Chapman are concerned, I see no good reason why his entry was not the initiation of a right as against the government, as it is evident that at that time the entryman contemplated the appropriation of the land for a home. His settlement and cultivation prior to the entry, availed him nothing, but the entry was a segregation of government land, not otherwise legally appropriated, and was followed by actual residence and cultivation, as required by law.

This view is sustained by the case of *Ficker v. Murphy* (2 L. D., 135), in which it is held (syllabus) that "Where a party goes upon public land as the tenant of an absent person, who has not made entry of the land, such tenant may, as in this case, make entry in his own name."

The case of *Call v. Swain* (3 L. D., 46), in which it is held (syllabus) that "One who settles or resides on public land as tenant of another who claims it, cannot thereby legally establish a claim to the land in his own right," is not in point. The case did not turn on that question, and the holding therein is *obiter dictum*, and will not admit of general application in departmental adjudications.

The judgment appealed from is affirmed.

DESERT LAND APPLICATION—PRELIMINARY PAPERS.

DANIEL C. BOOMER.

A desert land application, based on preliminary papers executed before a deputy clerk outside of the county in which the land is situated, cannot be accepted; but the applicant may be permitted to file a new affidavit properly executed, subject to intervening claims.

Secretary Smith to the Commissioner of the General Land Office, April 5,
(J. I. H.) 1894. (W. M. W.)

On the 22d of December, 1891, Daniel C. Boomer filed, in the local land office at Susanville, California, an application to make desert land entry for lots 3, 4, 7, 8, 9 and 10, of Sec. 2, T. 27 N., R. 17 E., M. D. M., under the acts of March 3, 1877 (19 Stat., 377), and March 3, 1891, (26 Stat., 1095).

The local officers rejected his application, for the reason that his declaration, and the depositions of his witnesses were made before the deputy county clerk and ex-officio deputy clerk of the superior court of the county of San Francisco, California, while the land applied for was in Lassen county, in said State. They held that said declaration and depositions should have been made before the register or

receiver at Susanville, or the judge or clerk of the county in which said land is situated.

Upon appeal, the action of the local officers was approved by your office on January 13, 1892, and a further appeal brings the case to the Department.

In the circular of instructions issued after the passage of the desert land law, of March 3, 1877 (5 L. D., 708), in paragraph seven it was said:

The declaration and corroborating affidavits may be made before either the register or receiver of the land district in which the lands are situated, or before the judge or clerk of a court of record of the county in which the lands are situated, and if the lands are in an unorganized county, then the affidavit may be made in an adjacent county. The depositions of applicant and witnesses in making final proof, must be taken in the same manner; and the authority of any practice or regulation, permitting original or final desert land affidavits to be executed before any other officers than those named above, is hereby revoked.

Prior to the 26th of May, 1890, section 2294, Revised Statutes, allowed a homestead applicant, whose family, or some member thereof, was residing on the land which he desired to enter, and upon which a bona fide improvement and settlement had been made, who was prevented, by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, to make the required affidavit before the clerk of the court for the county in which the applicant was an actual resident, and to transmit the same, with the fee and commissions, to the register and receiver.

On the 26th of May, 1890, said section was amended, so as to allow all applicants for the benefit of the homestead, preemption, timber-culture, or desert land law, who were prevented from personal attendance at the district land office, for the reasons above stated, to make the affidavits required by law, "before any commissioner of the United States circuit court, or the clerk of a court of record for the county in which the land is situated, and transmit the same, with the fee and commissions, to the register and receiver."

The act of March 3, 1891, which amended the desert land law of 1877, made no mention of the proper officer to take such affidavits. The act of May 26, 1890 (26 Stat., 121), which amended section 2294, of the Revised Statutes, is therefore the latest legislative action upon the subject. A circular of instructions was issued under that act (10 L. D., 687), in which it was said that final proof, and affidavits required to be made under the homestead, preemption, timber culture and desert land laws, may be made before any commissioner of the United States circuit court having jurisdiction over the county in which the lands are situated, or before the judge or clerk (not necessarily the clerk in the absence of the judge) of any court of record of the county or parish in which the lands are situated.

In the case of Edward Bowker (11 L. D., 361), it was held that the purpose of the act of 1890, in authorizing final proof to be taken before

"any commissioner of the United States circuit court," was to designate an additional, or new officer before whom such proof might be taken, but did not authorize the making of the proof and affidavits mentioned therein, before said commissioner outside the county and state or district or territory in which the lands are situated, subject to the exception provided for, in case the lands are within an unorganized county.

In that case, the land was situated in Dakota, while Bowker resided in Nebraska, and he asked that he be allowed to make his final proof in the latter State. He was not allowed to do so, and in deciding the question, the Congressional Record containing the debate upon the act of May 26, 1890, is quoted from, and the circular in 10 L. D., 687, is limited and restricted to the views expressed in said decision.

In the case at bar, the declaration of the applicant, and the depositions of his witnesses, were not taken before any officer authorized to take the same, under any act of Congress, or circular of your office, or decision of the Department. Application to make said entry was therefore properly rejected by the local officers, and your office did not err in approving their proceedings.

In his notice of appeal, the appellant specially requested that if your office action should be sustained by the Department, that he should be allowed a reasonable time in which to amend his application, to conform with the requirements of the Department. I think this is a case in which he may properly be allowed to make a new affidavit, in accordance with the law and regulations, in support of his original application, and such new affidavit when made, will be subject to any prior intervening adverse claim or claims. The decision appealed from is modified accordingly.

PRACTICE—CONTEST—DILIGENCE.

LUCHSINGER *v.* GRUBBS ET AL.

A contestant is bound to pursue the prosecution of his contest with all reasonable diligence, and where such rule is not observed the government may properly regard the contest as abandoned and proceed accordingly.

Secretary Smith to the Commissioner of the General Land Office, April 5,
(J. I. H.) 1894. (P. J. C.)

The land involved in this appeal is the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 2, T. 90 N., R. 48 W., Des Moines, Iowa, land district.

It appears by the record that John Grubbs made timber culture entry of said tract December 31, 1886. On March 29, 1888, Mary P. Scott filed an affidavit of contest, alleging that the land was not subject to timber culture entry, for the reason that it was not devoid of timber; that there is in said section now growing "more than ten acres of native timber, and at least 100 acres of native timber;" that Grubbs has failed to plow and cultivate any of said land.

Hearing was ordered on this contest, the testimony to be taken before the clerk of the district court, on May 10, 1888. The time was changed by order of the local office to June 10, following, and the testimony to be taken before a notary public at Sioux City. Notice of this change not having been served on defendant, the local office set the time again for taking the testimony before the same notary, July 18, and hearing at the local office on July 25, following. For reasons hereinafter explained, the testimony taken was not immediately sent to the local office.

On June 8, 1891, Daniel Luchsinger filed an affidavit of contest against the same entry, alleging failure to cultivate and abandonment. Hearing was ordered on this contest, and after personal service on the defendant, the testimony was taken before the clerk of the district court July 13, 1891, the defendant making default.

On July 20 following, the local officers held that the charges were sustained, and recommended that the entry be canceled. No appeal was taken from this decision.

On August 25, 1892, local counsel for Mary P. Scott filed a motion in your office, asking to be allowed to intervene in the case of Luchsinger v. Grubbs, and that that contest be dismissed. This motion is based upon her affidavit, in which she recites her contest against Grubbs; that she paid ten dollars advance fees in her contest; that the testimony was taken pursuant to notice, "and by agreement was held subject to a compromise" between her and Grubbs; that she tried several times "to effect the compromise, but his attorney was unable to find Grubbs;" that he finally succeeded in the fall of 1891, when a compromise "was about to be effected," but owing to the illness of her father living in Wisconsin she was summoned home, and it was not settled; that in January, 1892, her mother died and she had to take care of her father, and she could not return and look after her claim; that she has "been willing and ready to do my part, only waiting for Mr. Grubbs." She asks to be allowed to file the testimony taken at the hearing. It was filed in the local office January 9, 1893, transmitted to your office, and forwarded to the Department without any action having been taken.

By letter of September 17, 1892, your office denied her motion. It was also decided by said letter that the facts in the Luchsinger case warrant the decision of the local office, and there is no reason for disturbing their judgment. An appeal by Scott brings the case before the Department.

It was error for the local office to proceed with the Luchsinger contest while that of Scott was pending. But was the Scott contest then a live one? I think not. By her own showing she had withheld the testimony taken, for the purpose of making a compromise with the defendant. The contestant never filed the testimony until after the Luchsinger contest had become final, and took no measure whatever

to get a judgment of cancellation. The record shows that on January 12, 1889, the local office addressed her a letter, in which her attention was called to the status of the contest, and informed her that "if you intend to prosecute it you had better have it looked after or we will have to dismiss it for want of prosecution." She paid no attention to this notice, given her more than a year after the testimony had been taken. Luchsinger's contest was not filed for eighteen months after she had this notice, and it seems to me the local office was justified in concluding that she had abandoned her contest. Then after the final judgment in favor of Luchsinger, she allowed the matter to rest more than a year without any move. The local office reports, under date of August 4, 1892, that there were no papers on file in their office in relation to the Scott contest.

It will be conceded that a contestant is bound to pursue the prosecution of the contest with all reasonable diligence to the end, that as speedy a determination of the controversy may be had as is consistent with exact justice. The government being a party in interest in all matters pertaining to the disposal of the public lands, will not permit contestants to indefinitely prolong a contest, and I think, under the circumstances in this case, I am fully warranted in holding that the contestant abandoned her action.

The excuse offered for withholding the testimony for the period of nearly six years is without merit. She had, presumably, been to practically all the expense that could be assessed to her; the testimony was complete and ready for submission, and it would seem as if it were trifling with the plain and comprehensive rules of practice to permit the testimony thus to be withheld for this length of time, for the purpose of effecting a compromise, and allow her at this late a day to come in and claim any rights under her contest.

Your judgment is affirmed.

SIoux HALF-BREED SCRIP—UNSURVEYED LAND.

MCGREGOR ET AL. v. QUINN.

A Sioux half-breed scrip location on unsurveyed land is not authorized by law, if the Indian, prior thereto, has not made, or caused to be made improvements on the land for his personal use and benefit.

Secretary Smith to the Commissioner of the General Land Office, April 5,
(J. I. H.) 1894. (P. J. C.)

The land involved in this appeal is the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 24, T. 8 N., R. 8 E., Helena, Montana, land district.

The record shows that on August 25, 1890, William L. Quinn, as father and sole heir of Ellen Quinn, deceased, a Sioux half-breed Indian, located upon said tract, then unsurveyed, Sioux half-breed scrip, No. 348, "C" issued to her.

On September 9, following, Malachi Cordeiro filed a verified protest against said filing, alleging that he established his residence upon said land in October, 1888, with the view to securing title thereto as a homestead when the same should be surveyed; that his residence had been continuous since; he states his improvements, and puts their value at \$450; that the land was occupied when the scrip was filed and that it was done for speculative purposes; that Quinn never improved the tract.

On September 26, 1890, W. T. McGregor and sixty-three others filed a protest against the scrip entry, alleging—

1. That said William L. Quinn is a resident of the State of Minnesota and never resided in Montana and never occupied or lived upon said eighty (80) acres of land or any part thereof.

2. That said Quinn never made any improvements upon said land or any part thereof, and that no improvements of any kind were ever made on said land by or for the benefit or on behalf of said Quinn.

3. That said Quinn came to Montana solely for the purpose of making said entry for the benefit of other persons who now claim said land by virtue of said Quinn's entry, and that after making said entry said Quinn immediately left Montana for his home in Minnesota.

4. That since the making of said entry by said Quinn valid mining claims have been located on said lands.

Wherefore your petitioners pray that said half-breed scrip entry may be set aside and cancelled.

And your petitioners further say that said eighty (80) acres of land has been surveyed into lots and is now occupied by the undersigned for the purpose of a townsite, and your petitioners ask that their rights as lot claimants in said townsite may be protected and that they may acquire full title to their lots.

The same persons on November 15, 1890, also filed a protest against Cordeiro, denying his settlement and occupancy.

Your office, on October 15, 1890, directed that a hearing be ordered to determine the truth of these allegations. On November 1, 1890, Cordeiro formally withdrew his protest and appearance.

On January 6, 1891, William S. Ballou and others also filed a petition, asking to be made parties, because of their location of a placer mining claim on November 12, 1890, on a part of the premises. It is stated that their placer mine was "valuable as a placer claim for the limestone and building rock and sand contained therein."

A part of the protestants claiming to be residents on the land who filed their protest on September 26, 1890, filed an amendment to said protest January 3, 1891, in which it is alleged that Quinn abandoned said land on August 24, 1890.

By stipulation the testimony was taken before the clerk of the district court of Meagher county, and the testimony of some of the witnesses was taken by deposition. On examination of the testimony the local officers held that the townsite protestants were trespassers on the land, they having entered thereon on the night of August 27, and therefore not entitled to consideration; that the testimony does not establish the fact that the land is valuable for mineral, and it was subject to no

adverse valid claim at date of location of scrip; that the scribe had purchased and gone into possession of the improvements; that the placer location for building stone, etc., cannot be sustained under the rulings of *Conlin v. Kelly* (12 L. D., 1), and they recommended that Quinn's entry be held intact and the protests dismissed.

The protestants appealed, and your office, by letter of November 12, 1892, affirmed the action below, whereupon the protestants, *McGregor et al.*, prosecute this appeal. The mineral protestants did not appeal. The specifications of error are quite numerous, but I think, in view of my conclusion, that it is only necessary to consider those referring to the location of the scrip.

The findings of fact of the local office and your office I find to be substantially correct. The appellants went upon the land under cover of darkness, through the fence enclosing the ground, after the scrip location had been made; staked off two lots each; they caused the land to be surveyed into lots blocks, streets and alleys, and their selections to be marked upon the plat thus made. Clearly they were trespassers, and if it is found that the scrip location was valid, they can acquire no rights to the land.

Notwithstanding the protestants have failed to establish any rights in themselves, yet the government may avail itself of the testimony produced for the purpose of ascertaining whether there has been a compliance with the law in locating the scrip. In order to determine this fact, the testimony will be briefly gone into.

The land in controversy immediately adjoins the town of Castle, and so far as developed by the testimony is only valuable as an addition to the town. It is shown by the evidence that one F. L. Hensley settled on the tract in April, 1887, and filed in the recorder's office of Meagher county a "declaration of occupancy," as provided by the territorial laws of Montana (Compiled Statutes of Montana—1887—Chap. XCIX—p. 1101). All the improvements on the premises at the time of Quinn's location were placed there by Hensley. It appears that he tried to get title to the tract, but failed and on January 12, 1890, he and his wife transferred it by quitclaim deed to one James King, for the expressed consideration of \$10,000, who, on August 15, following, by bill of sale sold the improvements together with his right of possession to William L. Quinn for one hundred dollars, "and other valuable considerations."

It is further shown that on August 19, 1890, King came to Townsend, Montana, with Quinn and wife, and registered at the Townsend hotel, where they remained until the afternoon of that day, when King hired a carriage and drove them to Castle. King here registered the party, giving the residence of Quinn and wife as St. Paul, Minnesota. They remained at the hotel until the 24th, sleeping and taking their meals there, though they were out in the meantime, when King drove them back to Townsend. On the 25th the scrip was located. On the 26th Quinn and wife deeded the land to Messina Bullard, for one dollar "and

other valuable considerations." Quinn was never on the land, except as stated above. The testimony further shows that King paid the taxes on the improvements on the land for the year 1890, though the title was in Bullard. By an affidavit made by King, filed in this Department October 5, 1893, for the purpose of having this case advanced on the docket, it is shown that there was filed, on March 16, 1891, a town-site plat of the land, as "King Addition to Castle," and the dedication was made and acknowledged by Bullard and wife; that on December 6, 1890, James King and others were granted a certificate of incorporation for the Castle Land Company, and that on June 23, 1891, Bullard and wife deeded the land to said company; King is president of said company. Bullard appeared as counsel for Quinn at the hearing. Quinn was not present himself, but the testimony shows that King was there and took an active part, though he did not testify.

It will thus be seen that Quinn's first connection with the land was this alleged purchase of the improvements from King, who is the prominent and moving figure in all these transactions. The presumption would be probably, at least as between King and Quinn, that this bill of sale entitled Quinn to the possession of the land, but if he ever assumed the physical possession it could only have been at the time he was at the hotel in Castle from August 20 to 24. There is no evidence before me that he exercised any right of ownership over the land. The fullest extent to which it can possibly be asserted the testimony goes is that he was seen upon the premises with King at this time; but whatever his purpose may have been was kept a profoundly guarded secret. Thus, before seeing the land, without any personal knowledge of its location or the conditions surrounding it, or the character or value of the improvements thereon, the Indian purchased them, at best, hastily examined, and finally located his scrip on it.

The question therefore arises as to whether his location, based upon improvements thus purchased, can under the law and regulations be sustained.

The act of Congress of July 19, 1854 (10 Stat., 304), providing for the issuance and location of Sioux half-breed scrip, so far as applicable to this class of entries, authorized the President—

to exchange with the half-breeds or mixed-bloods of the Dacotah or Sioux nation of Indians, who are entitled to an interest therein, for the tract of land lying on the west side of Lake Pepin and the Mississippi River, in the Territory of Minnesota, which was set apart and granted for their use and benefit by the ninth article of the treaty of Prairie du Chien, . . . dated July 15, 1830, and for that purpose . . . to cause to be issued to said persons, on the execution by them, or by the legal representatives of such as may be minors, of a full and complete relinquishment by them to the United States of all their right, title, and interest, according to such form as shall be prescribed by the Commissioner of the General Land Office, . . . which said certificate or scrip may be located . . . upon any other unsurveyed lands, not reserved by government, upon which they have respectively made improvements: . . . And provided further, That no transfer or conveyance of any of said certificates or scrip shall be valid.

In the latest circular of instructions upon this class of location, amendatory of those that preceded it, the following rule was formulated—

With the view to protect fully the government interests and to carry out the law in its meaning, you are directed to see that the following requirements are strictly complied with where application is made to file said scrip for unsurveyed lands:

1st. That the application must be accompanied with the affidavit of the Indian, or other evidence that the land contains improvements made *by* or under the personal supervision or direction of said Indian, giving a detailed description of said improvements, and that they are for his personal use and benefit; in other words, you should be satisfied that the Indian has a direct connection with the land, and is claiming the same for his personal use. Unless such evidence is filed you will reject the application.

The validity of this rule has been considered and passed upon, and its meaning and purpose construed, by Mr. Secretary Noble, in the case of *Allen et al. v. Merrill et al.* (12 L. D., 138), in the following language:

The next question relates to the improvements required on unsurveyed lands. The act provides that the scrip "may be located," among other lands, upon any "unsurveyed lands, not reserved by government, upon which they" (the half breeds) "have respectively made improvements." I think this language clearly makes the improvements a condition precedent to the location. Congress has specifically declared what lands shall be subject to the scrip, thereby excluding all other lands than those defined, from the right of location. If unsurveyed, they must be lands upon which the half-breeds have made improvements, or they cannot be located with the scrip. The improvements constitute a part of the description of the lands defined as locatable.

This view is strictly in accord with the uniform construction given the act by the Department, shown by the circulars of instruction from time to time issued thereunder as above referred to. And in the *Sophia Felix* case, *supra*, it is expressly stated, speaking of unsurveyed lands, "that improvements are requisite as an antecedent to the right of location."

But it is in the third place contended in effect, that these circular instructions are in contravention of the provisions of the act, in that they impose upon the scrippee conditions not authorized thereby. I do not so regard them. It was clearly within the power of the Land Department, and, indeed, it was its plain duty, to issue such regulations as were deemed necessary to secure a faithful administration of the law, and to prevent its invasion. It was thus required that when locations were sought to be made upon unsurveyed lands, evidence should be furnished showing that the lands contained improvements made by the half-breed, or under his personal direction; in other words, showing that the half-breed had a direct connection with the land, and was claiming it for his personal use. This requirement is in no sense in contravention of the statute. It adds nothing to it. Unsurveyed lands are not locatable under the act, unless they contain improvements made by the half-breed. The regulation simply furnishes a means of showing that in this respect the law has been observed. It goes no further.

Clearly, then, under the law, the rules, and the departmental decisions, it is incumbent upon the Indian to identify himself with the land in such a way as to show his good faith in availing himself of the bounty the government has bestowed on him, by making or causing to be made for his personal use and benefit, improvements on unsurveyed land, prior to location of his scrip.

It seems to me that it cannot be seriously contended that the pur-

chase of improvements that are never used or occupied by the Indian is a compliance with the law. And much stronger must be this conviction where, as in the present case, the evidence is so persuasive to the conclusion that it was never the intention of Quinn to use the improvements for his personal use and benefit, but that he used his scrip solely in the interest of third parties. In fact, Quinn did not swear in the affidavit required by the rule above quoted that the improvements were for his benefit. Here is the affidavit in full, omitting the venue and jurat—

I, William L. Quinn, father and sole heir of Ellen Quinn, deceased, on oath declare that I have for the purpose of locating Sioux scrip No. 348 letter C for eighty acres of land, made or caused to be made the following improvements on the unsurveyed lands described on the plat and description accompanying this, to wit: One double log cabin fourteen by twenty-nine, having three doors and four windows, and being of the value of about three hundred dollars; one well twenty-two feet deep of the value of about fifty dollars; one corral of the value of about seventy-five dollars; one hundred and sixty rods of fencing of the value of about sixty dollars; and other improvements of the value of more than three thousand dollars.

The rule is specific on this point; it is reiterated: "*In other words, you should be satisfied that the Indian has a direct connection with the land, and is claiming the same for his personal use.*" The emphasis is mine.

I therefore think your judgment as to the validity of the scrip location should be reversed, and the same should be canceled. It is so ordered.

PRE-EMPTION—FINAL PROOF—ADVERSE CLAIM.

GRANT *v.* McDONNELL.

A pre-emptor must be held to strict compliance with the statute in the matter of submitting final proof within the prescribed period, where an adverse claim intervenes prior to the filing and publication of his notice of intention to submit said proof.

A pre-emptor in the submission of final proof is warranted in relying on the certificate of the register as to the "offered" or "unoffered" character of the land covered by his filing.

The case of *Call v. Swaim*, 3 L. D., 46, overruled.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 5, 1894. (W. F. M.)

On June 22, 1888, Daniel J. McDonnell filed declaratory statement No. 4376 for the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of section 14, township 51 N., range 13 W., Duluth land district, Minnesota. Settlement is alleged to have been made on June 20, 1888.

On January 10, 1889, James C. Grant made homestead entry for the same land.

In June, 1889, McDonnell filed notice of his intention to make final proof in support of his claim and due publication was made of this notice on the 17th of the same month. His final proof was made and offered on August 16, 1889, and on the same day Grant filed a protest against its acceptance.

As to the issues of fact raised by the proceedings below, I find with the decision of your office, and the opinion of the register and receiver, that the claimant McDonnell has in good faith, and in all substantial particulars, complied with the law, as to settlement and residence. His absences from the claim are satisfactorily accounted for, and his improvements, while not very extensive, are shown to be fairly in proportion and harmony with the means at his command; so that, if in other respects it shall appear that he is within the law, his final proof must be accepted.

Upon the filing of his declaratory statement by McDonnell, the register issued to him a certificate in the prescribed form, classifying the land as whether "offered," or "unoffered," indicating that the tract applied for was "unoffered" land, and containing the following specific warning: "Notice is therefore hereby given that this pre-emption filing expires on March 31, 1891, after which date the tract will be subject to the claim of any other qualified party." It appears, however, that the foregoing declaration is not supported by the records of the General Land Office, which are conclusive of the fact that the land in question has been offered at public sale.

The record discloses that the claimant initiated his final proof in time to have saved his rights in any event, in the absence of an adverse claim, having given notice of intention three days before the expiration of the twelve months allowed in the case of pre-emption upon offered lands; but under the later rulings of this Department, the intervention of the homestead entry of Grant on January 10, 1889, before the filing and publication of McDonnell's notice of intention to make final proof, imposes upon him a stricter compliance with the terms of the law. *Steele v. Engelman* 3 L. D., 92; *Laffoon v. Artis*, 9 L. D., 279. In the matter of his final proof it must be held, therefore, that McDonnell is in default, and his filing must be canceled, unless it be found that he was justified in relying and acting upon the apparent fact, as certified to by the register, that the land was "unoffered," in which case he would have had thirty-three months, instead of twelve, from the date of settlement, within which to make proof.

This precise question has been twice before the Department for adjudication, and in each case a different conclusion was reached.

In *Vettel v. Norton*, 1 L. D., 459, William Vettel filed his declaratory statement January 2, 1878, alleging settlement December 31, 1877, and Norton filed homestead application for the same tract March 22, 1879. The land was "offered," as a matter of fact, but the register had issued a certificate in all respects similar to the one held by McDonnell. It

is said in that case that "strictly, Vettel failed to comply with a requirement of the law, and in the presence of a valid adverse claim, his filing would be subject to forfeiture," but it is held that "the register was authorized to certify to the status of the lands. The certificate was issued for the sole and express purpose of instructing and protecting him in his duties and rights." Vettel, the claimant in that case though in default in the precise manner that Mr. McDonnell is in, default in this case, was awarded the land.

In *Call v. Swaim*, 3 L. D., 46, on review, in which the same question appears, a contrary view of the certifying power of the register is taken, though *Vettel v. Norton* is not in express terms overruled. It is there said that

such a certificate was not, I think, within the power of the local officers, because not in accordance with the law. Where a statute directs a certain thing, it is not competent for subordinate officers to change the enactment and give rights to parties which the statute withholds, under supposed facts which do not exist. Nor do I think Secretary Teller intended to announce in the case in question that local officers could lawfully issue a certificate which might cure a failure to comply with a positive enactment in the presence of an adverse claim.

It seems to me that this speculation as to Secretary Teller's intentions is to little purpose. The *Vettel* case speaks for itself in clear and luminous words. There is in it neither ambiguous nor obscure language to be interpreted. There was recognized the presence of an adverse claim, and whether Norton's filing were valid or invalid, depended wholly upon the effect to be given to the register's certificate. It was certainly valid in so far as Norton could make it so, and on its face, the announcement was made that "the register was authorized to certify to the status of the lands." This view appears to me to be more in consonance with sound reason than the opposing one, and I concur in it the more readily for the further reason that it is in harmony with the liberal policy of the Department in the administration of the public land laws. The question as to whether lands are "offered" or "unoffered" is one of fact, and it can not be twisted into one of law, and the authority of the register to certify to this matter of fact is not left to be inferred, but is derived from the prescribed form. *Vide* General Circular, p. 214.

In the case of *Smar v. Anderson*, 15 L. D., 218, which is in apparent conflict with the conclusion herein reached, the question was not in issue, and the expressions on the subject are, therefore, clearly *obiter dicta*.

The decretal part of the decision of your office logically follows the views herein expressed, and it is therefore affirmed.

The doctrine announced in the case of *Call v. Swaim* *supra*, is hereby overruled.

PRIVATE CLAIM—CONFIRMATION—JURIDICAL POSSESSION.

AGUA NEGRA GRANT.

The extent of a private claim must be ascertained by the record of juridical possession where the grant is confirmed as recommended by the surveyor-general and that officer's recommendation is ambiguous.

Secretary Smith to the Commissioner of the General Land Office, April 5,
(J. I. H.) 1894. (J. I. P.)

On July 20, 1886, Hon. George W. Julian, then surveyor-general of New Mexico, called the attention of your office to the unpatented land grant known as Agua Negra, in that Territory, stating that in his opinion said grant contained within its limits, as then surveyed, four times the quantity granted, and urging that the survey of said grant then existing be set aside, and a new survey ordered, "to embrace one square league, the Agua Negra spring to be in the center thereof."

Such correspondence was had between your office and said surveyor-general as resulted in a new survey of said grant being ordered, the direction therefor being that said grant should be surveyed in a square form, each side of which should be one league of 5000 Castillian varas, or two miles, 50 chains and 64+ links, containing 4438.68 acres, and having the Agua Negra spring as a common centre.

A re-survey of said grant was accordingly made, and on April 30, 1888, the surveyor-general forwarded the field notes and plat thereof to your office, and the same were transmitted to this Department by your office letter "D" of September 27, 1888.

On July 25, 1888, R. H. Longwell, of Santa Fe, New Mexico addressed a communication to this Department in reference to said re-survey, claiming to be one of the owners of the grant. He denounced in vigorous language what he termed the unauthorized and arbitrary proceedings of your office in ordering said re-survey, which he declares reduced the area of the grant seventy-five per cent, and of which he claims the grant owners had no notice whatever, and had no opportunity to be heard in the matter. After declaring that the then owners of said grant had purchased said grant in good faith, relying on the correctness of the first survey, he asks that a hearing in regard to the matter be accorded the grant owners.

On September 22, 1888, said letter was referred to your office with request for "report in duplicate and return of papers." By letter "D" of September 27, 1888, *supra*, your office complied with the request contained in the reference of the 22nd, above mentioned, and by letter "D" of November 30, 1892, your office transmitted to this Department certain letters of L. Bradford Prince, governor of New Mexico, in reference to said grant.

The history of this grant in brief is as follows—

On November 5, 1824, Ursula Chaves, wife of Antonio Sandoval, peti-

tioned the political chief to grant her husband a tract of land containing *one league in each direction*, at a place called Agua Negra, for the purpose of keeping permanently at the place the stock he has had there for many years. The Territorial Deputation referred the petition to the superior political chief on November 19, with the recommendation that it be granted, and with the statement, among other things, that the petitioner only asks *for one league square*, at the place known by the name of Agua Negra, for the purpose of keeping his herds there.

On November 19, 1824, the grant was made in the following language—

A petition was presented by Dona Ursula Chaves, in the absence of her husband, Don Antonio Sandoval, asking for a grant of one league square of land at the place called Agua Negra, in order that, having the proper title thereto, he may take his property and stock there, as he states. It was resolved, after having heard with pleasure the report of the political chief attached thereto that the grant of one league of land petitioned for by Don Antonio Sandoval at Agua Negra be granted to him without injury to any third party, and that, through the office of the secretary of this deputation, the proper copy be given to the party interested, which shall answer as a title there, and with the same, and by the direction of this body, Don Francisco Sarracino will proceed to the point of Agua Negra, and, according to the directions of its excellency, will place the aforesaid Don Antonio Sandoval in possession. (Private Land Claims, New Mexico, Vol. 1, p. 445.)

On December 5, 1824, Sarracino put Sandoval in possession of said grant, his report of that act being as follows—

Francisco Sarracino, justice commissioned by its excellency the deputation of this Territory, by virtue of the above written decree, being at the head of the Agua Negra spring, and having found no impediment, to the injury of any third party, for granting said possession, I place Don Antonio Sandoval in full and quiet possession of said land, pointing out and giving him full control over one league of 5,000 Castilian varas, in each direction, drawing a direct line from the spring 5,000 varas towards the east, one of the same length towards the west, another direct line or 5,000 varas towards the north, and another of 5,000 varas towards the south, which forms the proper square to the possession, which are to be the fixed boundaries of the tract of the Agua Negra, which I this day deliver to Don Antonio Sandoval, to be used by him as his own property, this document being a just title to him; and in testimony thereof, I signed, Mateo Lopes and Roque Chaves being witnesses, who not knowing how to write, did not sign.

Franco. Sarracino,
Commissioner.

(Private Land Claims, New Mexico, Vol. 1, p. 445.)

It will be observed that Sarracino thus put Sandoval in possession of four square leagues, which he interpreted to be the extent of the grant.

After New Mexico had become a territory of this government, Sandoval, by his attorney, filed his petition with the surveyor-general of that Territory, praying for the confirmation of his grant, stating that it contained 5,000 varas of land in each direction from said spring. On September 17, 1857, that officer, in accordance with section 8 of the act of July 22, 1854 (10 Stat., 308), acted on said claim, by declaring in

substance that the petition had asked for a tract of land "containing one league square;" that it had been made and in conformity to law, and was in the occupancy of the grantee at the time; that it is therefore confirmed and transmitted to Congress for its action in the premises (Private Land Claims of New Mexico, Vol. 1, p. 446).

Congress, on June 21, 1860 (12 Stat., 71), confirmed said claim (No. 12), with others, as recommended by the surveyor-general.

In February, 1877, the grant was surveyed, and the survey was approved by the surveyor-general June 5, 1877, and contained 17,361.11 acres, nearly four square leagues, instead of one square league, or 4,438.68 acres. It was this survey that was displaced by the survey in question.

This claim having been confirmed, the sole duty of this Department is to ascertain its extent and location. (Atlantic and Pacific R. R. Co. v. Fisher, 1 L. D., 392.) This is determined by the decree of confirmation (in this case the act of confirmation), unless the language thereof is so ambiguous as to require extraneous aid to show its meaning. (Pueblo of Monterey, 12 L. D., 364.)

In this case the claim is confirmed "as recommended by the Surveyor-General." (See language of act of June 21, 1860 (*supra*.) That officer's recommendation is as follows; after reciting the history of the grant made for one "league square," he says:

The document acted on by this office is a certified copy of the petition and grant made by the Secretary of the Territorial Deputation. The possession given by Francisco Sarracino, by order of the Territorial Deputation, is original. The signatures are proven to be genuine; and, as the grant is made in conformity to law, and was in the occupancy of the grantee at the time, it is therefore confirmed, and transmitted for the action of Congress in the premises. (Private Land Claims, New Mexico, Vol. 1, p. 446.)

The statement of the surveyor-general, in brief, is that the petition referred to asked for a grant a "league square;" that it was made, and legally made; and was occupied by the grantee at the time, that is, at the date of the grant, as the petition of Sandoval shows that he had been keeping cattle, on the land petitioned for, for many years.

A reasonable construction of the recommendation of the surveyor-general would seem to be, that he recommended "the grant as made, and as occupied by the grantee."

Here arises an ambiguity. The grant was made for *one league of land petitioned for*; it was occupied to the extent of "four square leagues," of which latter quantity the grantee was put in juridical possession. (Private Land Claims, New Mexico, Vol. 1, pp. 443-444.) This grant then stands confirmed by Congress as recommended by the surveyor-general, and that officer's recommendation is ambiguous.

Under such circumstances reference must be had to the record of juridical possession, in order to ascertain the extent of the grant. (Graham v. United States, 4 Wall., 259; United States v. Pico, 5 Wall., 536; Rancho Buena Vista, 13 L. D., 84.)

Sandoval's petition was for "a tract containing one league in each direction," at the place called "Agua Negra," as stated. The grant was made "of one league of land, as petitioned for." Juridical possession was given him, of one league of 5,000 Castilian varas in each direction from the Agua Negra Spring, or of four square leagues. (Private Land Claims, New Mexico, Vol. 1, pp. 443-444.) That measurement must control the officers of the United States in surveying this grant. (4 Wall., 259.) That proceeding ascertained and settled the boundaries of the land granted; it had the force of a judicial determination. It bound the Mexican government, and is equally binding upon the officers of our government. (5 Wall., 536.)

It will be observed that the language of the petition for a grant of "one league in each direction" changes in the reference to the political chief and in the fore part of the grant to a "league square." But the language of the granting part of the grant is, "that the grant of one league of land petitioned for by Don Antonio Sandoval, at Agua Negra, be granted." The league of land petitioned for was *one league in each direction*. The officer who put Sandoval in juridical possession of the land so interpreted the grant, and hence put him in possession of four square leagues, instead of one. The apparent change in the language indicated can only be attributed to clumsy translation, as the extent of the grant seems to have been well understood by all concerned at the time it was made.

It is clear to my mind that this grant as confirmed contains four square leagues, and that it cannot be reduced below that amount. Such was the contemporaneous construction put upon it by the parties thereto, when it was made. Such was the construction put upon it by this government when the first survey was made in 1877, and which was published to the world in maps and official reports, and it was upon that construction, in which they had confidence, that the present owners were induced to invest their means in said grant.

Attempts to recover the public domain, where fraudulently acquired, are always commendable, and should be persevered in, but the preservation of vested interests, acquired in good faith, and the maintenance of the stability of titles so obtained is one of the most sacred duties of the government. Fraud can not be presumed, but must be strictly proven. I have been unable, in this case, to find anything on which to base an inference of fraud. The weight of authority, and of the facts presented by this record, is against the correctness of the resurvey made in 1888, and in favor of the survey made in 1877.

The conclusions reached renders it unnecessary to pass on the question of want of notice of the resurvey, urged by the grant claimants. Nor is it necessary to order a hearing in the premises.

The resurvey of said grant made in 1888 is rejected, and you are directed, by virtue of the authority vested in you by the second clause of the act of March 3, 1869 (15 Stat., 342), to issue a patent for said grant, in accordance with the survey thereof made in 1877.

RESERVOIR LANDS—SETTLEMENT—ENTRY.

CONNORS v. MOHR.

Where settlement is made prior to the hour at which the adverse entry of another is allowed the right of the settler is superior, though the entryman was at the local office before such settlement, and only prevented from making his entry then by the number of prior applicants in attendance at said office.

In such case the right of the settler will be limited to the technical quarter section on which his settlement is made.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 5, 1894. (E. M. R.)

This case involves lots 2, 3, 4, 5 and 6 of sec. 31, T. 39 N., R. 11 E., Wausau land district, Wisconsin.

The record shows that on December 22, 1890, Cornelia Mohr made homestead entry for the land in issue.

January 9, 1891, A. W. Connors made application to enter the above described tract, alleging settlement between the hours of 12 and 1 o'clock A. M., of the 22d day of December, 1890. This application was refused for conflict with the entry of Mohr.

Subsequently, on March 4, 1891, the local officers issued an order, citing the parties to appear at the office on April 7, 1891, to determine the conflicting claims of the entryman of record and the contestant.

November 4, 1891, the register and the receiver rendered their joint opinion, wherein they recommended for cancellation the entry of Mohr and allowed the entry of Connors. Upon appeal your office decision of June 18, 1892, was rendered wherein the decision appealed from was affirmed. Upon further appeal by Mohr, the case is now before the Department for final adjudication.

The appeal raises two questions, first, that the entry of Mohr made December 22d, should be allowed as of date December 20th, as she was then present, ready to file, and was only prevented from so doing by reason of the inability of the local officers to attend to her application at that time; and, second, that the settlement of Connors should be restricted to the technical quarter section as defined by the public survey.

The evidence shows on behalf of Connors the following facts. That he was at the land office on December 20th, but left in the afternoon, that on Sunday the 21st, he was on the land in question and blazed the northern line thereof between lots 1 and 2, but made no acts of settlement, as he did not think that acts of settlement made on Sunday would be valid. Sometime between 12 and 1 o'clock A. M., of Monday, December 22, 1890, he went upon the land where he commenced to make his settlement, and where he was found by other parties seeking homes at 7 A. M. His acts of settlement were followed up by actual residence of himself and family, they being upon the land at the date of the hearing before the local officers. In going upon the land he put up two notices of his claim, one of them being placed at the corners of the

four townships formed at the south west corner of section 31, and the other some twenty rods north of the corner where the road entered the section. This would make both of the two notices in lot 4. Lots 4, 3 and 5 are in the SW. $\frac{1}{4}$ and lots 2 and 6 are in the NW. $\frac{1}{4}$ of section 31. He built his house about forty rods from the corner of the four townships, where he put up his first notice. The evidence further shows that the contestant was under the impression that he had settled on lot 6 but admits under cross-examination that he had not, but was on lot 4. It is also in evidence that there was a large number of applicants in line at the land office when they were opened on December 20, 1890, and that Cornelia Mohr went into the line of applicants on December 19, 1890, and that she was in line on December 20, 1890, with her application to file upon the land in controversy at 9 A. M. when the office was opened for filing. She remained in line during the day but was unable to file owing to the inability of the local officers to attend to those who were ahead of her. December 21st was Sunday and the office was closed. On Monday morning the 22nd, upon her statement that she only wanted this particular tract, and that in the event that it was already filed upon, she would offer no other applications, those in front gave way to her and she then filed, being the first filer that morning. A few days thereafter she went upon the land and commenced residing thereon, and has built a house about forty rods from the house of the contestant, and her improvements, as shown by the testimony, equal, if not surpass those of Connors.

In considering the first question raised by the appeal it is discovered to be one heretofore not passed upon by this Department.

In *Johnson v. Crawford*, 15 L. D., page 302, the syllabus is as follows:

The word day as employed in section 3 act of June 20, 1890, opening to settlement and entry certain reservoir lands, is not restricted to the "business day" recognized in the practice of the local office, but contemplates the calendar day of twenty four hours; and a settlement on said lands, made after the beginning of said day and prior to the entry of another on the same day defeats the right of such entryman.

The facts in that case were as follows: Crawford made homestead entry at 3 o'clock in the afternoon of December the 20th and Johnson settled on the land shortly after 12 o'clock in the morning of the same day, and whilst the settlement there was made before the opening of the land office still the purpose of the decision seems to be to give the settler the superior right where the settlement, as a matter of fact, was initiated prior to the filing of the entry at the local office. It is therefore held that where a settlement is initiated prior to the hour at which entry is made, that the entry will be canceled even though the entryman was present at the land office seeking to make entry for the particular tract in controversy before the settlement was made. If there was no other question now at bar it would follow that the decision appealed from would be affirmed, but it is maintained by counsel for the appellant that as the settlement of Connors is in the SW. $\frac{1}{4}$ of section 31, and cannot embrace lots 2 and 6 in the NW. $\frac{1}{4}$ of the same sec-

tion. Upon this point the evidence shows that Connors' house is on lot 4 and that the two notices he put up are also on the same lot. That is the evidences of his claim are confined to the southwest quarter. It is true that on Sunday, December 21st, he went upon the land and blazed the line between lots 1 and 2 possibly also the northern boundary of lot 6, the evidence not being clear as to whether he blazed the entire line or only between lots 1 and 2. However that may be, there is nothing in the testimony to show to what extent the blazing was done, or whether it was sufficient to put one on notice. In addition to this it is well to be borne in mind that this blazing was not done with the intent of initiating settlement and acts of settlement must go hand in hand with the intent to make an immediate segregation of the land for the purposes of a home. The blazing was done by the contestant for the purpose of identifying the northern boundary of the claim he intended to settle upon on the next day. Such being the facts, the case of *Staples v. Richardson*, 16 L. D., 248, is in point where it was held that "the notice given by settlement and improvement extends only to the technical quarter section upon which they are situated."

It is therefore held that, as the burden of proof rests upon the contestant to prove all facts material to the success of his cause, and as he has failed to show a sufficiency of notice upon the NW. $\frac{1}{4}$ of section 31, he will be restricted to the SW. $\frac{1}{4}$ of section 31.

The entry of Mohr will be canceled as to lots 3, 4 and 5 and will remain intact as to lots 2 and 6 in the northwest quarter of said section, and your office decision is accordingly modified.

COAL LAND-ENTRY-ALIENATION.

DURANGO LAND AND COAL COMPANY.

A coal land entry allowed in accordance with existing regulations that did not require affirmative proof as to the location of the land with respect to completed railroads, should not be canceled for the want of such proof.

The sale of a coal land claim after the actual execution of the final proof, but prior to its filing and the payment of the purchase money, does not necessarily warrant the conclusion that the entry was made for the use and benefit of another.

Secretary Smith to the Commissioner of the General Land Office, April 5, (J. I. H.) 1894. (W. F. M.)

It appears by the record that John H. Bowman and John R. Stearns, on February 24, 1880, filed their declaratory statement for the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of section 33, township 13 S., range 86 W., of the Gunnison land district, Colorado, and that, thereafter, on August 16, 1880, they made actual coal entry No. 5, Leadville series, by filing the corroborated affidavit prescribed by the regulations of the Department.

Final receipt and certificate were issued on August 16, 1880.

On July 16, 1892, the entry was canceled by your office letter to the register and receiver, because of failure of the claimants to comply with the requirements of paragraphs 13 and 35 of departmental regulations issued July 31, 1882 (1 L. D.; 687).

On October 22, 1892, the Durango Land and Coal Company, alleging itself the owner, by purchase in good faith of the lands in question, filed their application in the local office for a re-instatement of the entry, on the ground of want of notice of the order of cancellation, the company having been apprised of the order for the first time on August 13, 1892.

The case is before me on appeal from the decision of your office denying this application.

In making the entry the claimants proceeded and acted under the rules and regulations of the General Land Office of date the 15th of April, 1880, and it appears that there was a strict compliance with the terms of that circular, which does not require affirmative proof of the location of the land with respect to completed railroads. It is a legitimate presumption that the register, who issued his certificate, and the receiver, who received the money at the minimum price of ten dollars an acre and issued his final receipt therefor, had evidence before them showing the location of the land to be more than fifteen miles from any completed railroad, or else had personal knowledge of that fact.

It must be held, therefore, that the entry was improperly canceled for want of such proof.

The decision appealed from, however, is placed upon another ground, and, proceeding now to consider this, I find the following expressions contained therein:

On August 10, 1880, six days prior to entry, they deeded the land to which they had not acquired any vested rights, to William A. Bell, trustee. It further appears that said Bell was trustee for said Durango Land and Coal Company, who subsequently acquired title from Bell.

It would thus appear that at the time of entry, said claimants had no right to make the entry in their own names, and the fact that their names do appear in the entry, convinces me that they did not make the entry for their own use and benefit, but for the use and benefit of said company, the grantee of Bell.

The regulations require that the entry shall be made "for the use and benefit" of the claimant, "and not directly or indirectly for the use and benefit of any other party," and the question presented for determination is whether or not, under this requirement, the entry of Bowman and Stearns is valid.

Their final proof pursues, substantially, the form prescribed by this Department, the affidavits having been sworn to on August 10, 1880; but it appearing from *ex parte* affidavits and record evidence that the proof was not filed in the local office until August 16, 1880, and that the sale by the claimants to Bell was made on August 10, 1880, after the execution of the final proof, but six days before the filing of the proof with the register and receiver, the payment of the price of the

land, and the issuance of the certificate, and the receipt therefor, your office decision found, in effect, that the premature sale to Bell was conclusive that Bowman and Stearns "did not make the entry for their own use and benefit, but for the use and benefit" of the Durango Coal and Land Company.

The regulations of the General Land Office issued under the coal land law, rule 37, provides: "Assignments of the right to purchase will be recognized when properly executed." This refers, of course, to the inchoate right acquired by virtue of the fact of settlement and improvement, and of the filing of the declaratory statement; nevertheless, there is here a distinct recognition of the right to sell, before final certificate, a right allowed under no other form of pre-emption filing or entry, and which would seem to negative the suggestion that a sale at any stage of the entry is conclusive evidence of an intention to perpetrate a fraud upon the government. The precise question has never been adjudicated in express terms by this Department, but the reported cases are not without value as indicating the policy of the government in this class of entries.

In *McGillicuddy et al. v. Tompkins et al.*, 14 L. D., 633, the evidence, at the hearing, showed that the claimants had, after declaratory statement, but before final proof, entered into an agreement by the terms of which they were bound, after patent, to transfer the land, or a certain interest therein, to another person who had exhausted his right under the coal land law. Since the law authorizes "only one entry by the same person or association of persons," it was held that "to allow the pending application would, therefore, be in substance to authorize an entry in contravention of said statutory provision."

In the case of *Conner v. Terry*, 15 L. D., 310, it is said: "The declaratory statement of Terry was rejected because the testimony satisfied the local officers and yourself that he filed it in the interest of others. The evidence upon this point is circumstantial, but points strongly to that conclusion," and the Commissioner was sustained.

The facts of the later case of the Union Coal Company, 17 L. D., 351, are in some respects similar to those of the one at bar. In that case the declaratory statement was dated November 4, 1882, and on the same day the claimant, Solomon Rothschild, conveyed "all his right, title and interest in said land to the Union Pacific Railway Company, with 'authority to make purchase of said lands from the United States, in the name of the grantor herein,' " etc. The final affidavit was made in the usual form by Robert M. McDowell, the alleged agent of Rothschild, on March 2, 1883, and upon this showing, to wit, that Rothschild had sold his interest in the land four months before entry was made in his name, and in his absence, it was held that "such entry was not made for his own use and benefit, but for the use and benefit of the Union Pacific Railway Company, or its grantee, the Union Coal Company."

The case under consideration differs, however, from the one last cited, and indeed from all the leading cases, in that the sale was not made until after the actual execution of the final proof before a notary public, when, as appears from the affidavits in the record, the parties to the conveyance thought, in good faith, that the claimants had acquired vested rights in the land; and in all the cases, it seems, hearings were had and evidence taken upon the question as to whether or not the entries were made "for the use and benefit" of the entrymen.

The question just stated, as I view it, is one of fact which can only be concluded by testimony on the issue when raised. I find no authority, either statutory or jurisprudential, which warrants the holding that a sale by the claimant, under the circumstances of the case at bar, is conclusive evidence of fraud on his part. If his rights were fixed and vested, the inherent right of alienation had attached; if, on the other hand, those rights were in suspension, and contingent, as I think they were, then the assignee took nothing by the purchase except by relation back in the event of perfection of the entry; but the transaction, in the absence of an actual fraudulent intent, can not, in equity, be held to have annihilated all rights adverse to the government.

It appears that on July 26, 1892, Charles C. Gullett and John D. Carlisle filed in the land office at Gunnison, Colorado, their declaratory statement alleging possession and settlement on the same land, on July 25, 1892, and on July 18, 1893, they tendered the final proof and purchase price of the land, which were rejected by the register and receiver because of the present pending proceedings. On appeal by Gullett and Carlisle to your office from this action of the local office, the papers were transmitted to this Department, by your office letter ("N") of February 1, 1894, to be considered in connection with the present case.

In view of the intervention, in this manner, of an apparent adverse interest, and of the fact that there has been no contradictory hearing below upon the real question at issue, I think the case should be remanded for that purpose.

The decision appealed from is therefore set aside, and you will direct a hearing before the register and receiver as to whether or not Bowman and Stearns made the entry for their own use and benefit.

The papers transmitted with your office letter of February 1, 1894, in the matter of the appeal of Gullett and Carlisle, are herewith returned for appropriate action thereon, as also the papers transmitted with your office letter of December 24, 1892.

PATENT—PROCEEDINGS TO VACATE—PRIVATE CLAIM.

MISSION OF SAN FERNANDO.

On application made for suit to set aside a patent issued for a private claim all matters that under the issues could have been, or should have been determined by the board of land commissioners will be presumed to have been adjudicated by said board.

The Department will decline to advise suit for the vacation of a patent issued on a private claim, where it appears that in the proceedings before the board of land commissioners the government had due opportunity to present all the alleged defects in the grant, where no direct charge of fraud on the part of the grantee as against the government is made, and where the patent has been outstanding for many years and the rights of third parties have intervened.

Secretary Smith to the Attorney General, April 11, 1894.

(J. I. H.)

(J. I. P.)

I beg to acknowledge receipt of your letter of May 19, 1893, enclosing a petition presented to you for the institution of a suit to secure the cancellation of the patent heretofore issued for the San Fernando private land grant in California, and other papers relating to the same subject. The petition and papers were referred to the Commissioner of the General Land Office for examination and report.

From the report of that officer, under date of June 5, 1893, a copy of which is herewith sent, it appears that a previous application to the same effect was presented to the Commissioner of the General Land Office by the same parties, which was forwarded here with a report thereon by that officer, a copy of which is also sent you. Upon consideration of that report this Department, on June 10, 1892, declined to recommend the institution of suit to secure cancellation of the patent as prayed. A copy of the letter to the Commissioner to that effect is also enclosed.

After a careful reconsideration of the matter I might well leave it without discussion, stating my concurrence in the views heretofore expressed, in the communications referred to, by the Commissioner of the General Land Office and this Department. But as you request a full statement of my views on the questions involved in the case, and also upon the policy of attacking this and other Mexican grants in California, I will proceed to comply with your request as briefly as may be consistent with a discussion of the subject.

This grant was made June 17, 1846, by Pio Pico, the then constitutional governor of the Department of California, by virtue of a decree of the Departmental Assembly of April 13, of that year, directing him to raise means for the purpose of maintaining the integrity of that Department. The consideration was \$14,000, and the grantee was one Don Eulogio Celis.

Pio Pico testified before the board of land commissioners, hereinafter mentioned, that the grant was executed as stated, and that it was

made under the authority of the decree of the Departmental Assembly and the special instructions of the Mexican Government, for the purpose of raising funds to prepare for defense against the attack of the American army, and that the consideration was actually paid. The grant was presented to the board of land commissioners of California, organized under the act of March 3, 1851 (9 Stat., 631), to ascertain and settle private land claims in that State, and was duly confirmed by that tribunal on July 3, 1855.

An appeal was taken by the United States from said decree of confirmation to the district court for the Southern district of California, but upon the statement of the Attorney-General that said "appeal will not be prosecuted by the United States," the same was dismissed by the court on March 15, 1858, with leave to the confirmer to proceed, under the decree of the board of land commissioners, as a final decree. Survey of said grant was made in December, 1858, by United States Deputy Hancock. Without going into detailed statement of the facts, suffice it to say, that objections to said survey having been made by the United States district attorney, the United States district court, on February 17, 1860, ordered the United States surveyor-general of California to report said survey into court. This, on April 2, 1861, was done, and, said district court, assuming jurisdiction under the act of June 14, 1860 (12 Stat., 33), such proceedings were had that on August 14, 1863, said court rendered a judgment correcting and amending said survey, and in accordance therewith, and in conformity thereto, an amended survey was made, which was approved by said court and carried into patent January 8, 1873.

The grant is attacked on the grounds (1) that the lands were missionary lands, and were therefore not subject of grant by a territorial governor; (2) that possession was not given and was not to be taken by Celis for eight months from date of the grant; (3) that the paper given by Pio Pico was a bold attempt to sell lands at a private sale, which he had no shadow of a legal right to do; and (4) that the amount of land granted—whether it exceeded eleven leagues or not—is not given. The above, it is contended, appears on the face of the grant.

It is further contended by those who are urging the institution of a suit (1) that Pio Pico had no power whatever to make this pretended grant; (2) that if he could have made any grant at all of Mission lands, or of lands that were not vacant, his authority was limited to eleven square leagues; (3) that the board of land commissioners had no jurisdiction to give validity to a paper said to have been executed by Pio Pico by confirming it as a Mexican grant; (4) that the decree of confirmation executed by the board of land commissioners is void for uncertainty; (5) that the survey did not conform, and pretend to conform, to the decree of confirmation and was not authorized by it; (6) that the decree, survey and patent can and ought to be set aside in a direct proceeding for fraud, mistake and inadvertency. And in the

brief filed by those contending for the bringing of this suit, it is urged that if the third proposition, above stated, should be deemed untenable, the other five are certainly sound, and furnish ample grounds to sustain their application.

A discussion of all the points enumerated is not deemed necessary in this communication. Suffice it to say that all the defects alleged as appearing on the face of the grant itself, as well as the first two of the six propositions urged against the validity of said grant, relate to matters in the history of said grant, prior to its confirmation, and were presumably included in the issues involved in the investigation, and passed on by the board of land commissioners, in the conclusion expressed in its decree of confirmation. All matters that, under the issues, could have been, or should have been, adjudicated in that proceeding, are presumed to have been adjudicated. (*United States v. Throckmorton*, 98 U. S.) The tribunal that rendered that decree was one of competent jurisdiction, was created for that express purpose by the act above referred to, and to the proceedings, in which said decree was rendered, the United States was a party. An appeal from said decree to the United States district court for the southern district of California was voluntarily abandoned by the government, and upon that decree a survey was made and patent issued thereon, as stated.

It is urged that the action of the United States district court for the southern district of California, in approving the amended survey, was without authority of law, because without jurisdiction, and that the issuance of patent thereon was based on a void act.

For the sake of this argument it will be admitted that when the district court amended said survey and ordered a new one, its power, under the act of July 1, 1864 (13 Stat., 332), was exhausted, and its further action in approving said survey was without jurisdiction and of no binding force whatever.

Under section 3 of the act of 1864, *supra*, said survey should have been made under the direction and supervision of the Commissioner of the General Land Office, and should have been approved or rejected by him, whereas in this case that officer seems to have acted under the decree of said court as a clerical officer merely, in the issuance of said patent.

But suppose this patent should be set aside because of the want of jurisdiction in the court that ordered and approved the survey on which it is based, it would bring the government back to that point in the proceedings where the judgment of the district court was rendered with reference to said survey, which, under the act of 1864, *supra*, was clearly within its jurisdiction. A new survey, in accordance with said decree, under the direction of the Commissioner of the General Land Office, would then be in order, which, when returned to that officer, would be subject to objections from all parties interested. But that would not affect the validity of the grant nor the decree of

confirmation rendered by the board of land commissioners. Back of that decree the government, in my judgment cannot go (authorities are numerous on this point), and a resurvey, in accordance with the decree of the district court, under the control and supervision of the Commissioner of the General Land Office, would be of no substantial advantage to those who are seeking to establish the invalidity of the grant.

But there is another view of this case which presents itself. An examination of the abstract of title to said grant reveals the fact that these lands have passed by various mesne conveyances into other hands than those of the original grantee; that most, if not all, of it is owned by a corporation engaged in agriculture, and that this patent has been outstanding for twenty years. Whatever the equities in this case may be, they are stale. In the case of the San Jacinto Tin Co. (10 Sawyer p. 639), the court says:

Although on grounds of public policy, statutes of limitation do not run against the United States, and laches cannot be imputed to them; yet the facility with which the truth could originally be shown by them; the changed condition of the parties, and of the property, by the lapse of time; the difficulty from this cause, of meeting the objections which might, perhaps, at the time have been readily explained; and the acquisition of interests by third parties upon faith of the decree, are elements which will always be considered by the court in determining whether it would be equitable to grant the relief prayed. All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the government be the suitor against him.

The suit proposed, if brought, could only be brought on the grounds of fraud or mistake, and then only

when the government has such an interest in the remedy sought by reason of its interest in the land, or the fraud has been practiced on the government and operates to its prejudice, or it is under obligation to some individual to make his title good by setting aside the fraudulent patent, or the duty to the public requires such action. (*United States v. San Jacinto Tin Co.*, 125 U. S., 273; *United States v. Beebe*, 127 U. S., 338.)

If the action is based on fraud, it must be fraud that is extrinsic or collateral to the matter, tried in the proceedings before the Board of Land Commissioners, and not fraud which was in issue at that trial. (*United States v. Thockmorton*, 98 U. S., 61), and the fraud must be shown to have operated to the prejudice of the government, as stated above.

There is no showing in the application under consideration, thus far observed, that the government had no opportunity, or was by any act of the grantee or confirmer deprived of the opportunity, in the proceedings before the board of land commissioners, of presenting to that tribunal all the alleged defects in said grant, and no direct charge of fraud on the part of the grantee or confirmer, by which the interests of the government were prejudiced, and said confirmatory decree obtained, has been discovered; and having had its opportunity or day in court, it would appear that under the rule laid down by the authorities, it is now too late for the government to urge any matter that was involved in the confirmatory decree, referred to.

It is urged by Mr. Garland, the attorney for the petitioners, that—this *grant* aside or out of the way, the land covered by it is the property of the United States, and these private parties who may have settled upon any part of it, must get their rights thereto, if they do at all, from the United States, and therefore this application comes directly within the rule, as to the duty of the United States in such cases, laid down in *United States v. Beebe*, 127 U. S., 338.

Granted that this statement is true, there are other considerations that should be entertained in such cases. The government has by the most solemn instrument by which that act could be evidenced parted with its interest in the land in question. Since then others, charged by law with a knowledge of the rights of the grant claimants in the premises, have settled within the limits of the grant, and the government is now asked to cancel the patent it has issued, in order that these settlers may obtain title to the land. There is no statement that the government has issued patents to any of these settlers, or that it has taken any steps by reason of which it is under obligations to make the title of any settler good by setting aside this patent. It is urged that its duty to the public requires the government to bring this action. The preservation of our rapidly diminishing public domain for occupation by actual settlers is a sacred duty, but the fact should not be lost sight of that the maintainance of our treaty obligations, and of the stability of land titles, and the protection of the interests of *bona fide* purchasers involved because of the faith reposed in the government's patent, devolves a duty of equal sacredness upon the government, and it is difficult to imagine a case where the former duty would become so urgent as to cause it to ignore or disregard the latter; evidently such a condition does not exist in this case.

The force of a patent issued in such a case is stated in *Beard v. Federy*, 3 Wall., 478, as follows:

A patent of the United States issued upon a confirmation of a claim to land by virtue of a right or title derived from Spain or Mexico is to be regarded in two aspects,—as a deed of the United States, and as record of the action of the government upon the title of the claimant as it existed upon the acquisition of California. As a deed its operation is that of a quitclaim, or rather of a conveyance of such interest as the United States possessed in the land, and it takes effect by relation at the time when proceedings were instituted by the filing of the petition before the board of land commissioners. As a record of the government it is evidence that the claim asserted was valid under the laws of Mexico, and it was entitled to recognition and protection by the stipulations of the treaty; and might have been located under the former government, and is correctly located now so as to embrace the premises as they are surveyed and described. As against the government and the parties claiming under the government, this record, so long as it remains unvacated, is conclusive.

See also *Moore v. Steinbach*, 127 U. S., 70.

Again, it is a well known rule of law that equity will not interfere to give relief, where an adequate remedy is provided by law. Such a remedy was afforded by appeal from the decree of the Board of Land Commissioners; this was voluntarily abandoned by the government,

and the grant claimants directed to proceed as under a final decree. Again, an available legal remedy was at hand by appeal from the adverse ruling of the court on the government's exceptions to said survey. None was taken. If the rule mentioned applies to the government as to individual litigants, it could not maintain the action urged in a court of equity, because of its failure to avail itself of the legal remedies at hand.

As stated, this grant was confirmed in 1855, was surveyed in 1858, which survey was amended after the act of June 14, 1860, and when approved was carried into patent in 1873. Eighteen years elapsed between confirmation and patent. Surely, ample time was allowed for the presentation of objections to the survey and proceedings. If any were presented, they were deemed of no force, as the survey was approved as amended and passed to patent.

Notwithstanding the objections urged to said survey, I am of the opinion, in the light of the authorities mentioned, and the United States v. Hancock case (133 U. S., 193), that the obligations of the government to any individual, its duty to the public, or its interest in this matter, is not such as would warrant the bringing of an action to cancel this patent, or that would enable the government to maintain itself in a court of equity on the facts presented.

In regard to the policy that should be pursued by the government in attacking this and other Mexican grants in California, I have to say that I do not believe that any general policy in that respect could be formulated. The government will of necessity have to be controlled by the facts involved in each case, keeping in mind the injunction of the supreme court in the Maxwell Land Grant case, 121 U. S., 325,—that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing and that it cannot be done upon a bare preponderance of evidence, which leaves the issue in doubt.

Besides, a due regard for the sacredness of our treaty obligations should invoke caution before proceeding to take steps to cancel so solemn an instrument as a patent of the government.

OKLAHOMA TOWN LOTS—SECTION 4, ACT OF MAY 14, 1890.

INSTRUCTIONS.

Secretary Smith to the Commissioner of the General Land Office, April 18, 1894.

I am in receipt of your letter of March 19, 1894, reporting the sale of unclaimed lots in certain towns in Oklahoma Territory disposed of under the fourth section of the act of May 14, 1890 (26 Stat., 109), which provides "that all lots not disposed of as hereinbefore provided

for shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of any such town."

These lots were disposed of in accordance with departmental circular of March 31, 1893, 16 L. D., 341, and your letter shows the net proceeds of such sale held by the townsite board and requests special instructions as to the proper disposition of the same.

As these lots are, under the statute, to be disposed of for the benefit of the municipal government, you will direct the townsite trustees to turn over the net proceeds in each instance, to the proper officer of the town, whose receipt shall be taken for the same and forwarded to your office with their final report in the matter of the disposal of the lots in each town coming under the provisions of said act of May 14, 1890.

RAILROAD LANDS—CONFLICTING SETTLEMENT CLAIMS.

DAVIDSON *v.* GELINAS ET AL.

In the adjustment of conflicting settlement claims for lands restored by the forfeiture act of March 2, 1889, acts of settlement performed before such restoration may be properly considered in determining equitable priorities.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (G. B. G.)

The land in controversy herein is the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 31, T. 48 N., R. 37 W., Marquette land district, Michigan.

This land was formerly embraced within the limits of the Marquette, Houghton and Ontonagon railroad grant, but was forfeited by the act of March 2, 1889 (25 Stat., 1008); on November 12, 1887, the plaintiff, George Davidson, offered homestead application for the aforesaid land, which application was rejected, and on appeal to your office, the action of the local officers in rejecting said application was approved February 13, 1890.

On April 30, 1888, the defendants, Alfred Nadon and Samuel Gelinas, filed applications to enter—Nadon the SE. $\frac{1}{4}$ and Gelinas the SW. $\frac{1}{4}$ of said Sec. 31, which applications were rejected: both parties appealed from the action of the local officers, and on February 15, 1890, your office approved such action.

September 1, 1890, under instructions of your office, the land in controversy, with other tracts, was declared open to entry, whereupon a hearing was ordered, the three parties having on May 1, 1889, renewed their respective applications to enter.

It will be observed that the controversy is between Davidson and Nadon, as to the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and between Davidson and Gelinas as to the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, there being no conflict as to the N. $\frac{1}{2}$ of these quarter sections.

The hearing was had December 12, 1890, and on October 5, 1891, the local officers awarded the preference right to enter the whole of said SE. $\frac{1}{4}$ to Nadon, and the entire SW. $\frac{1}{4}$ to Gelinas, and rejected the application of Davidson to enter the S. $\frac{1}{2}$ of both quarter sections. Davidson appealed, and your office affirmed the finding of the local officers.

Davidson in due course appealed, and the case is before the Department on his complaint substantially that your office erred in its conclusions.

The material facts, as developed by the testimony, are in substance as follows:

It appears that Davidson first went upon the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 31, on November 15, 1887, three days after he had filed his first application to enter the land.

He states that he blazed a tree at the south-west corner of the section, one also at the south-east corner of the section, and on these trees wrote his name and a statement that he had "filed" on November 12, 1887. That he remained there two days and nights, doing a little clearing, and sleeping in a brush camp.

About December 20, 1887, he let a contract to have a shanty built on the tract, and returned to Lower Michigan.

He came back to the tract on May 3, 1888, remained until the following October, when he again left the land, but returned to it March 14, 1889, and remained until May 20, following. He left it again on the date last named and remained away until October, 1889, at which time he returned to the tract, and brought his family with him, and he and his family maintained a continuous residence on the land from that time until the date of the hearing in December, 1890, up to which time he had made improvements on the land valued at \$350.

From the testimony submitted by the defendant Gelinas, it appears that he first went upon the SW. $\frac{1}{4}$ of said Sec. 31 on April 1, 1888, and that at that time he found on the extreme south-west corner of said tract the body of Davidson's house. He, as Davidson did, made frequent trips away from the land for various purposes. At the date of the hearing his improvements were valued at \$150.

Gelinas in behalf of defendant Nadon testified that the two together put upon the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31 a house for Nadon in March and April, 1888. Nadon also made frequent trips away from the land. At the date of the hearing he was living on the same, and had been so living continuously after May 1, 1890, and his improvements are valued at \$160.

It is in evidence that the frequent and prolonged trips of all the parties in interest away from the land claimed by them, was either for the purpose of securing work for family support, or on account of sickness.

It also appears that when Gelinas and Nadon presented their respective applications to enter the specified tracts on April 30, 1888, they

were informed of Davidson's ownership of the building on the SW. $\frac{1}{4}$ of said Sec. 31.

Under the foregoing statement of facts, which is in brief substantially the same as found by your office, I cannot concur in the opinion appealed from.

The act of March 2, 1889, (*supra*) does not in express terms provide that prior settlers on the lands forfeited by said act shall be awarded a preference right to enter the same, and it is clear in the absence of an express statutory provision, that no such legal right exists, and such acts of settlement protected by no legal authority are only important in adjusting conflicting equities. *Geer v. Farrington* (4 L. D., 410).

The acts of settlement of the several parties in interest herein, prior to March 2, 1889, were meagre, but a careful study of the evidence, in the light of subsequent events, forces the conviction that they were made in good faith, and it follows in good conscience that settlement rights acquired after the law authorized settlement, should relate back to the initiatory acts.

The evidence shows that Davidson made the first acts of settlement on the land claimed by him, and good reasons are shown why he did not sooner move his family on the land, and the defendants Gelinas and Nadon went on to the same land with full notice of the extent of his claim, and the evidence does not warrant the assumption that they in good faith believed that the tract had been abandoned.

The judgment appealed from is reversed, and the case remanded for proceedings consistent with this opinion.

DEPUTY UNITED STATES SURVEYOR.—SECTION 452, R. S.

MULLER *v.* COLEMAN.

A deputy United States surveyor, while holding such appointment, is not qualified to make an entry of public land.

Secretary Smith to the Commissioner of the General Land Office, April 16,
(J. I. H.) 1894. (P. J. C.)

The land involved in this appeal is the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 32, T. 13 N., R. 9 E., Santa Fe, New Mexico Territory, land district.

The record shows that Sherrard Coleman filed coal declaratory statement on March 29, 1890, for the SW. $\frac{1}{4}$ of said section township and range, alleging possession on and from February 15, 1890. On the same day Frederick Muller also filed coal declaratory statement for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section alleging possession on and from March 26, 1890. On May 3, following, Coleman applied to purchase said land as coal land, under the act of Congress of March 3, 1873 (17 Stat., 607), which was suspended by the local office, and adverse claimant Muller notified. He appeared, and filed his protest, when a hearing was ordered before the local officers. As a result the register

and receiver decided that as it appears from the evidence that Coleman was at the time of filing his declaratory statement a deputy United States surveyor, it was unnecessary to review the testimony, as by reason of the fact that he held a "position in the surveyor-general's office," he was disqualified from making the filing and purchase, under the circular of September 15, 1890 (11 L. D., 348). Coleman appealed, and your office, by letter of October 13, 1892, decided that Coleman was not under contract with the United States during the year 1890, and hence was not a deputy United States surveyor at the date of his filing and application to purchase; and upon the facts as disclosed by the evidence, your office decided that Coleman had "the preference right to purchase the land."

A motion for review of this decision was filed, and on consideration thereof your office, by letter of December 24, 1892, held—

A further examination of the records of this office discloses that February 15, 1890, and thereafter, Coleman was under contract with the Department for survey of certain public lands.

Upon this question your office decided—

That a deputy United States surveyor cannot be considered an employee in the office of the Commissioner of the General Land Office as defined in the McMicken case. He is merely a contractor doing specific work, and on the completion thereof his connection with the government ceases. He is not an officer of the United States even in the sense that a deputy mineral surveyor is.

The motion for review was overruled.

Muller appealed, and, one of the questions raised by his appeal is, whether Coleman, being a deputy United States surveyor at the time of his filing and application to purchase, is disqualified under the law and rules of the Department from taking said land.

Coleman admits in his testimony that he was a deputy United States surveyor on March 29, 1890.

The circular of instructions of September 15, 1890, (*supra*) reads as follows—

Section 452 of the Revised Statutes provides that—

"The officers, clerks and employes in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office."

The Honorable Secretary of the Interior, in the case of Herbert McMicken *et al.* (10 L. D., 96), has decided that the disqualification to enter public lands, contained in said section, extends to officers, clerks, and employes in *any* of the branches of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of the public lands.

In accordance with said decision, all officers, clerks, and employes in the offices of the surveyor-general, the local land offices, and the General Land Office, or any person, wherever located, employed under the supervision of the Commissioner of the General Land Office, are, during such employment, prohibited from entering or becoming interested, directly or indirectly, in any of the public lands of the United States.

In the McMicken case the entryman was an employe of the surveyor-general's office. Under these decisions, and the instructions above quoted, it is clear that an employe of the surveyor-generals is within the inhibition. Now, the question is, whether a deputy surveyor is an employe, in the sense that would bring him within the rule.

He is appointed by the surveyor-general, under section 2223 of the Revised Statutes, which reads as follows—

Every surveyor-general shall engage a sufficient number of skillful surveyors as his deputies, to whom he is authorized to administer the necessary oaths upon their appointments. He shall have authority to frame regulations for their direction, not inconsistent with law or the instructions of the General Land Office, and to remove them for negligence or misconduct in office.

It is only deputy surveyors who can secure contracts from the surveyors-general for the survey of public lands.

While these surveys are made under contract, yet I think the surveyor is an employe of the surveyor-general, within the spirit of the law and the rule above quoted. In the American and English Encyclopedia of Law (Vol. 6, p. 637) is found this legal definition of employes:

The term "employee" is the correlative of "employer," and neither term has either technically or in general use a restricted meaning by which any particular employment or service is indicated. The terms are as applicable to attorney and client, physician and patient, as to master and servant, a farmer and day-laborer, or a master-mechanic and his workman. To employ is to engage or use another as an agent or substitute in transacting business or the performance of some service; it may be skilled labor, or the service of the scientist or professional man as well as service of unskilled manual labor. (Allen, F.). *Gurney v. A. & G. W. Ry. Co.*, 58 N. Y., 358.

In the prosecution of his work the deputy surveyor is clearly under the control and supervision of the surveyor-general; as a deputy he has access to the records in the office of the surveyor-general, and the compensation he receives comes from that officer. I am of the opinion that Coleman was disqualified from taking any part of the public land while a deputy United States surveyor, and hence his filing should be canceled.

This determination renders it unnecessary to examine the testimony submitted, or pass upon the other questions raised by the appeal.

Your judgment is therefore reversed; Coleman's filing will be cancelled, and Muller's will be allowed, subject to a compliance with the law.

HOMESTEAD ENTRY—AMENDED SECTION 2289, R. S.

LEITCH v. MOEN.

A fraudulent deed, purporting to convey a tract from the homesteader to his son, will not operate to relieve the entryman from the statutory disqualification imposed upon persons that own more than one hundred and sixty acres of land. Such disqualification also extends to one who holds land under a contract of purchase though the payments thereunder have not been completed.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (C. W. P.)

I have considered the case of William Leitch v. Ole O. Moen on appeal by the latter from the decision of your office of July 13, 1892, holding for cancellation his entry of the SW. $\frac{1}{4}$ of Sec. 2, T. 144 N., R. 54 W., Fargo land district, North Dakota.

The record shows that Moen made homestead entry of the said tract August 1, 1891, subject to Leitch's preference right of entry.

The land in controversy had been covered by Moen's homestead entry, which Leitch had successfully contested.

August 24, 1891, before the expiration of his preference right, Leitch applied to enter said land as a homestead. Whereupon a hearing was ordered, to determine the rights of the parties respectively. The local officers decided in favor of Moen and held that Leitch was not qualified because he was the proprietor of more than one hundred and sixty acres of land. Leitch appealed, and your office reversed their decision, held for cancellation Moen's entry, and allowed Leitch's application to enter the land. Moen appealed to the Department.

The record shows that William Leitch in the year 1883, made pre-emption cash entry for the NE. $\frac{1}{4}$ of Sec. 12, T. 144 N., R. 54 W., for which he received a patent. April 15, 1890, the said Leitch and his wife made a deed of this tract to Thomas Leitch, their son. The deed is in evidence and is a deed of bargain and sale. In the *premises* it purports to grant a fee simple title. The consideration is love and affection and one dollar and other valuable considerations which are set out in the deed. In the *habendum* an estate for life is reserved to the said William Leitch and his wife.

The evidence shows that this deed was not recorded; that William Leitch and his wife resided on the land at the time of the execution of the deed and were still residing thereon at the time of the hearing. On the 22d of May, 1891, he mortgaged certain personal property to Horton and Elken to secure the payment of a debt, and in the mortgage is contained the following clause:

For the purpose of obtaining the property for which this note is given, I . . . hereby certify that I own in my own name . . . acres of land in NE. section 12, town 144 range 54, county of Steele, N. D., with . . . acres improved, and the whole is worth \$— which is not incumbered by mortgage or otherwise, except \$— and I own and have on said land \$— worth of personal property over and above all indebtedness.

On the 29th of October, 1891, he mortgaged 4500 bushels of wheat to the Hillsboro National Bank to secure a promissory note for \$1021. In this mortgage it is set out that this wheat is "now in my granary situated on the NE. $\frac{1}{4}$ of section 13, township 144, range 54." There is also in evidence a certificate, under seal, of the county auditor of the county of Steele, North Dakota, that the said NE. $\frac{1}{4}$ of Sec. 12, T. 144 N., R. 54 W. appears in the name of William Leitch on the tax list of 1891.

The restrictive clause in the deed to Thomas Leitch, reserving a life estate to himself and his wife, is clearly void as repugnant to the grant in the premises. 3 Washburn on Real Property, 644.

But a careful consideration of the evidence has convinced me that the deed is fraudulent. It bears upon it the badges of fraud; it was secret, it was not recorded; it is from a father to his son; the father occupied and cultivated the land as before; he mortgaged the wheat crop; he held himself out to the world as the owner; he is so described in the chattel mortgages to the Hillsboro National Bank and to Horton and Elken; he paid the taxes on it for the year 1890, and it stood in his name on the tax books of the county up to the 20th of November, 1891.

In *Johnson v. Johnson* (4 L. D., 158) it is said "under no circumstances will the Department permit itself knowingly to be made an instrument to further the fraudulent designs of an individual who is seeking to acquire title to land to which he has no right." And in *Condon v. Arnold* (2 L. D., 96) it is said

Under the law, your office and this Department are charged with the execution of the law relative to the distribution of the public land among competent applicants, and this Department has always maintained the right to take such summary action as may be required to protect the interests of the government, whenever such a state of facts is shown as establishes conclusively that an attempt is being made to acquire title to public land in fraud of the existing laws.

See also *Caldwell v. Carden* (4 L. D., 306).

For these reasons I cannot concur with your office in the opinion that Leitch is not the proprietor of the land in question, within the meaning of the act of March 3, 1891, (25 Stat., 1095).

It is also alleged that Leitch is holding under contract of sale the NE. $\frac{1}{4}$ of Sec. 11, T. 144 N., R. 54 W., containing one hundred and fifty-nine acres of land.

It appears that he had paid the sum of \$400 under said contract, but all the deferred payments thereunder had not matured at the time of the hearing. Leitch has attempted to prove that he has no beneficial interest in this contract, but that he is merely a trustee for his grandson, who is an infant under twenty-one years. But even if parol evidence was admissible to prove the trust against strangers to the instrument, it appears that in a mortgage to the Alliance Hall Association of North Dakota, he certifies that he is the owner of the NE. $\frac{1}{4}$ of Sec. 11, T. 144 R. 54 Steele county, North Dakota—and is his unsupported testimony

sufficient to overcome the declaration in writing made before the contest was instituted? I think not. The question then occurs is this such an interest in land as would disqualify him under the act of March 3, 1891, (26 Stat., 1095).

It is held in *Boyce v. Burnett* (16 L. D., 562) that the first clause of section 2260 of the Revised Statutes, which prohibits the right of pre-emption to one who is the proprietor of three hundred and twenty acres of land in any State or Territory, extends to one who holds land under a contract of purchase, though the payments thereunder have not been completed to the date of settlement on the pre-emption claim. I think the same principle would apply to the prohibition in the act of March 3, 1891, (26 Stat., 2289, p. 1098).

Upon the whole case I hold that William Leitch had, at the time of his application to enter the land in controversy, such a proprietorship in more than one hundred and sixty acres of land as disqualified him under the homestead law.

The judgment of your office is reversed, the entry of Moen will be allowed to stand and Leitch's application rejected.

OSAGE LANDS—DEFAULT.

MARY A. FRIEND.

A purchaser of Osage Indian lands in default as to final payment may be permitted to make such payment when no declaration of forfeiture has been made, and no adverse claim exists.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (C. W. P.)

I am in receipt of your office letter of February 17, 1893, transmitting the appeal of Mary A. Friend from the decision of your office of December 23, 1892, denying her application to make payment for the SW. $\frac{1}{4}$ of Sec. 32, T. 30 S., R. 24 W., Garden City land district, Kansas.

The tract was part of the Osage Indian trust and diminished reserve lands in Kansas, and her settlement and filing were made under the act of May 28, 1880, (21 Stat., 143) the purchase price being \$1.25 per acre.

The claimant made her declaratory statement June 17, 1885, and final proof December 15, 1885. On the 31st of January, 1891, the claimant being in default in the payment of her last installment, thirty days were allowed her for payment, in default of which the entry was to be cancelled and the land again offered for sale. She failed to make payment within the time, and December 23, 1891, this entry was included in a list submitted to the Secretary of the Interior, as covering lands to be offered for sale. The land was advertised to be sold September 5, 1892, but no bids were offered.

Before the day fixed for the sale Mrs. Friend caused a draft for the amount due to be forwarded by the Wichita National Bank. The clerk of the bank by mistake made the draft payable to the receiver at Larned. The draft was received before the sale, but it was not accepted by the register and receiver. Mrs. Friend was then telegraphed to send the money to the bank at once. This telegram, it seems, could not be delivered, owing to the banks being closed on that day as a legal holiday, and it did not reach Mrs. Friend until the next day, when it was supposed to be too late to prevent the land being sold.

Mrs. Friend has shown her good faith by making her home upon the land since her settlement thereon, by building a house, and by cultivating a part of the land and planting trees; her improvements, however, are not of much value, being valued at \$200 only.

She now applies to be allowed to complete the payment for the tract. Your office decided that Mrs. Friend's application must be denied, it not being presented in proper form on September 5, 1892, the day of sale. Mrs. Friend has appealed to the Department.

The second section of the act of May 28, 1880 (21 Stat., 143) provides for the sale of Osage Indian lands under the pre-emption laws.

And upon payment of not less than one-fourth the purchase price, shall be permitted to enter not exceeding one quarter section each, the balance to be paid in three equal installments, with like penalties, liabilities and restrictions as to default and forfeiture, as provided in section one of this act.

Section one provides:

And if default be made by any settler in the payment of any portion or installment at the time it becomes due under the foregoing provisions, his entire claim, and any money he may have paid thereon, shall be forfeited, and the land shall, after proper notice, be offered for sale according to the terms hereinafter prescribed, unless before the day fixed for such offering the whole amount of purchase money shall be paid by said claimant, so as to entitle him to receive his patent for the tract embracing his claim.

And section three, that—

All lands upon which such default has continued for ninety days shall be placed upon a list, and the Secretary of the Interior shall cause the same to be duly proclaimed for sale in the manner prescribed for the offering of the public lands, but not exceeding one quarter section shall be sold to any one purchaser, at a price not less than the price fixed by law, but such lands, upon which such default shall be made, shall be offered for sale by advertisement of not less than thirty days in two newspapers in the proper land districts respectively, and unless the purchase price be fully paid before the day named in the notice, shall be sold for cash to the highest bidder, at not less than the price fixed by law.

In the case of Edward Uhlig (12 L. D., 111), under the provisions in the act of May 15, 1888, (25 Stat., 150), authorizing the Secretary of the Interior to extend the time of payment to purchasers of the lands of the Omaha Indians, which are similar to those in the act under consideration, it was held that a purchaser of Omaha Indian lands, whose claim was forfeited for non-payment, may be permitted, in the absence of any adverse right, to complete his payments where it appears that

he had made due tender of the necessary sums prior to the judgment of forfeiture.

Subsequently, the Department, in a letter of instructions, dated October 23, 1893, (17 L. D., 490) addressed to your office, adopted the rulings in the case of Edward Uhlig, (*supra*) and directed that, under the act of April 22, 1890, (25 Stat., 60) requiring purchasers of lands in the Pawnee Reservation, to make payment within two years, under the penalty of forfeiture in case of default, all persons in default who had, prior to the date thereof, [the instructions] tendered payment, should be permitted, in the absence of a declaration of forfeiture, to complete their purchases.

In the case at bar there has been no judgment of forfeiture, and there appear to be no rights but those of the claimant and the government, and there is no reason why the tender of payment by Mrs. Friend should not be accepted.

The decision of your office is therefore reversed, and the local officers are directed to accept the tender of the amount due for principal and interest, in compliance with the act of May 28, 1880.

WAGON ROAD GRANT—INDEMNITY SELECTION—TRANSFEREE.

KNOX *v.* GRANDY.

A mere allegation of settlement, as set forth in a pre-emption declaratory statement filed after an order of withdrawal, is not sufficient to establish the fact of settlement so as to except the land covered thereby from the operation of the withdrawal.

A wagon road indemnity selection, canceled on the relinquishment of the company, may be reinstated, for the protection of a purchaser holding under a sale of the land made by the company prior to selection.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (E. W.)

The defendant in the case of R. F. Knox *v.* John Grandy, Roseburg land district, Oregon, has appealed to the Department from your office decision of August 6, 1892, in which the decision of the local officers is reversed and defendant's entry held for cancellation.

The land involved is the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 15, T. 27 S., R. 13 W., in said land district, and is within the indemnity limits of the grant to the State of Oregon, to aid in the construction of a military wagon road from the navigable waters of Coos Bay to Roseburg, under the act of Congress of March 3, 1869 (15 Stat., 340).

The letter of withdrawal under said act was filed in the local office on the 13th of April, 1871, and selection of said tract was made on June 12, 1874.

The Coos Bay Wagon Road Company, the beneficiary of the act of Congress above mentioned, sold the land to one W. G. Schofield on May 2, 1873.

Plaintiff Knox bought from Schofield one undivided half interest on May 23, 1873, and the remaining interest on the 11th of August, thereafter, and upon the title thus acquired bases his claim.

Defendant Grandy made homestead entry on the 24th day of October, 1888, and commuted the same to cash entry in 1889.

In support of his claim defendant Grandy sets up that Schofield filed declaratory statement upon the land in controversy on the 15th day of April, 1872, alleging settlement on April 7, 1871, and contends that this filing and settlement excludes the tract from the operation of the grant.

The record discloses no evidence that Schofield settled upon the land prior to the 13th of April, 1871, the date of the withdrawal, other than the allegation to that effect, contained in his declaratory statement, and this has been held by the Department to be insufficient to establish settlement. See *Barr v. Northern Pacific R. R. Co.* (7 L. D., 235); *Northern Pacific R. R. Co. v. Beck* (11 L. D., 584); also same company *v. Kranich et al.* (12 L. D., 384).

The pre-emption of Schofield being thus eliminated from the case, furnishes no support to the claim of defendant.

The previous history of the case as disclosed by the record shows that your office in July, 1891, ordered a hearing between Grandy and the Coos Bay Wagon Road Company, to determine whether the tract was occupied under the settlement laws at the time the rights of said company attached. Defendant Grandy appeared at the local office on the day set for the hearing thus ordered and filed the relinquishment of said company to the land in controversy, after which your office, upon receipt of the papers in the case, canceled the claim of said company and allowed Grandy's homestead entry to remain.

Subsequent to this, in November, 1891, Knox, who then appeared for the first time in the case, made application for a hearing, alleging that he was the owner of said land, by purchase from the said wagon road company and that he was not a party to the former litigation, and had no notice thereof, in order that he might have an opportunity to make proof of his title.

Accordingly your office, in December, 1891, ordered a hearing for the purpose of determining whether the selection of said company should be re-instated.

In pursuance of said order, a hearing was had before the local officers resulting in a decision adverse to the claim of Knox, which decision, upon appeal, your office reversed, and the case is now before the Department by appeal of defendant Grandy.

Now the entry of Grandy, made in 1888, was improperly allowed, for the reason that the tract had been withdrawn under the act of

Congress and had been selected by the Coos Bay Wagon Road Company for purposes of indemnity.

The plaintiff Knox, it is true, had purchased the tract in controversy before the date of selection, and he thereby acquired a perfect equity in the same. It further appears that said tract was duly listed to the Coos Bay Wagon Road Company on June 12, 1874, when his claim ripened into a complete legal title. In the absence of any legal obstacle his claim should be allowed.

The selection of the Coos Bay Wagon Road Company is hereby re-instated in order that the same may inure to the benefit of plaintiff Knox, and your office decision holding defendant's entry for cancellation is affirmed.

RAILROAD LANDS—FORFEITURE ACT OF MARCH 2, 1889.

KINNEY v. CYR ET AL.

Section 3 of the forfeiture act of March 2, 1889, gives superiority, in legal recognition, to pre-emption or homestead claims, subsisting on May 1, 1888, and asserted by actual occupation, over every other kind of claim.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (W. F. M.)

The lands involved in this controversy form a part of an odd section within the common limits of the Marquette and State Line and the Ontonagon and State Line railroad grants, made to the State of Michigan by the act of June 3, 1856 (11 Stat., 21), and more particularly described as the E. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 7, township 42 N., range 34 W., of the land district of Marquette, Michigan.

For convenience sake, your statement of the attitude of the case, which appears to be full and correct, is adopted, as follows:

June 13, 1856, all the public lands supposed to be within the limits of said contemplated roads were withdrawn from market.

Under authority of a joint resolution of Congress, approved July 5, 1862 (12 Stat., 620), the route of the Marquette and State Line road was relocated, and the governor of Michigan subsequently relinquished all the odd sections along the originally located line of said Marquette and State Line Company, from Marquette and Brule River, including the lands in the common limits, to the United States.

The governor of Michigan, also, at the request of the Commissioner of the General Land Office, afterwards relinquished to the United States the lands from Ontonagon to the common limits above referred to, and on May 29, 1873, the Acting Commissioner of this office ordered a restoration to market of all lands within the limits of the Marquette and State Line Company, and of the Ontonagon and State Line Company, in accordance with said relinquishment, but said order of restoration was suspended on July 30, of that year, and this was the status of the land when, on September 17, 1880, the Board of Control of the State of Michigan declared the franchises and grant of lands to the Ontonagon and State Line Company forfeited to the State, and transferred the same to the Ontonagon and Brule

River R. R. Co., organized under the laws of Michigan. This action of the Board of Control, ratified by the State legislature June 7, 1881, has, notwithstanding the governor's relinquishment, been recognized by the United States as conferring an interest in said lands upon the Ontonagon and Brule River Railroad Company (see 14 L. D., 463), and the act of March 2, 1889 (25 Stat., 1008), forfeited to the United States *all lands* theretofore granted to the State of Michigan by the act of June 3, 1856, "which are opposite to and coterminous with the uncompleted portion of any railroad to aid in the construction of which said lands were granted or applied."

Whether or not the title to said tracts is considered to have been continuously in the State of Michigan or the several railroad companies from the time said tracts were withdrawn from market under the act of June 3, 1856, till the passage of the said forfeiture act of March 2, 1889, the land has not been subject to private entry since said withdrawal.

September 19, 1879, Louis D. Cyr, Donald C. Mackinnon and Alexander Mackinnon located S. C. scrip under act of June 22, 1860, No. F, 149, upon the N. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said section 7, R. & R., No. 680.

October 2, 1879, James Robertson located S. C. scrip, No. B, 716, upon the S. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said Sec. 7, R. & R., No. 697.

March 8, 1880, Samuel M. Stephenson and William Holmes located S. C. scrip, R. 762, sub. 2, upon the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 7, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Sec. 18, in said township, R. & R., No. 788.

February 21, 1880, Solomon Greenhoot and Jacob Buckholtz made cash entry, No. 10423, for the N. $\frac{1}{4}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said Sec. 7.

The third section of the forfeiture act of March 2, 1889, provides:

"That in all cases where any of the lands forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States or under State selections in Michigan confirmed by the Secretary of the Interior, under color of the public-land laws, where the consideration received therefor is still retained by the government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby, confirmed: *Provided, however,* That where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States.

That nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in any such State selection, upon which there were bona fide pre-emption or homestead claims on the first day of May, eighteen hundred and eighty-eight, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed."

It seems that John S. Kinney made an application to file a pre-emption declaratory statement for the E. $\frac{1}{4}$ of W. $\frac{1}{4}$ of Sec. 7, which was rejected on December 4, 1884; that he appealed from said rejection on December 6, 1884; that he made a second application to file a D. S. on April 5, 1888, which was rejected the same day; that he appealed from said second rejection April 21, 1888; that he afterward filed in your office a homestead application for same land, accompanied by an affidavit sworn to February 21, 1890, in which he alleged settlement on the land applied for December 15, 1884; and that he also filed in your office March 25, 1890, an affidavit claiming said land by virtue of occupation on the first day of May, 1888.

A hearing was had before the local office in pursuance of an application by the private cash entrymen to establish their right of confirmation under the third section of the act of March 2, 1889.

The register and receiver found that "Kinney was a bona fide pre-emption claimant on May 1, 1888, and was asserting his claim by actual occupation," and recommended that the scrip and cash entries of Cyr and others be canceled, and "that Kinney be allowed to enter said land as a homestead, he having made application to change his claim to a homestead."

This decision was affirmed by your office and the case is now before this Department on appeal.

The specifications of error upon which the appeal is based are reducible to the two following, to wit:

1. In holding in favor of Kinney when it appears that the land had test pits for iron over it, thus tending to show that it was the iron and not a home that said Kinney desired, hence he acted in bad faith, and
2. In holding in favor of Kinney when it appears that he was not a bona fide occupant of the land on May 1, 1888, because he had legal notice of the claims of Cyr *et. al.*, when he went upon the land.

Generally, it may be stated that the testimony goes to show with such overwhelming force that Kinney has acted in thorough good faith in settling upon the land, and in making substantial and valuable improvements and residing continuously thereon, that there can be no serious controversy about the fact of his having in very truth builded a home for himself and family. The evidence does not "tend to show," as claimed by counsel, "that it was the iron and not a home that said Kinney desired," but on the contrary, there is scarcely so much as a line of credible testimony in favor of that theory.

The contention of the appellants that Kinney's bona fides is affected by constructive notice of their antecedent private cash entries, is hardly more meritorious. The *bona fides* of the statute is nothing more than that good faith which is implied from a sincere purpose to acquire a home, emphasized by subsequent compliance with the requirements of the law. The construction contended for by counsel would defeat the saving object of the statute, which was, manifestly and by its very terms, to give superiority, in legal recognition, to "pre-emption or homestead claims" subsisting on the "first day of May, 1888, arising or asserted by actual occupation," over every other sort of claim whatsoever.

The decision appealed from is, therefore, affirmed.

OKLAHOMA LANDS—SECOND HOMESTEAD.

JACOB C. TALMADGE.

The right to make homestead entry of land within the former Cheyenne and Arapahoe reservation (but not included in the Creek cession of January 19, 1889), can not be exercised by one who has previously commuted a homestead entry.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (J. L. McC.)

Jacob C. Talmadge has appealed from the decision of your office, dated November 23, 1892, sustaining the action of the local officers in rejecting his application to make homestead entry of the SW. $\frac{1}{4}$ of Sec. 11, T. 9 N., R. 16 W., Oklahoma land district, Oklahoma Territory.

The ground of the rejection was that the applicant had previously (in Wichita county, Kansas, on October 18, 1886,) made a homestead entry, which he afterward commuted (at Wa-Keeney, Kansas).

The tract for which Talmadge applies is situated within the limits of the land ceded by the Cheyenne and Arapahoe tribes, the description of which may be found in the second article of the treaty embodied in the act of March 3, 1891 (26 Stat., 989-1022).

The method in which the land so ceded by the Cheyennes and Arapahoes shall be disposed of by the government is set forth in section 16 of the same act. (page 1026):

Whenever any of the lands acquired by either of the three foregoing agreements respecting lands in the Indian or Oklahoma Territory shall, by operation of law or proclamation of the President of the United States, be open to settlement, they shall be disposed of, to actual settlers only, under the provisions of the homestead and townsite laws (except section 2301 of the Revised Statutes, which shall not apply).

"Under the provisions of the homestead laws," the commutation of a homestead entry is a bar to the further exercise of the homestead right (see Frank J. Lipinski, 13 L. D., 439).

If Congress had intended to allow persons to make entries of these lands who had previously commuted an entry, it would undoubtedly have so expressly provided.

The appellant contends, however, that the case at bar is ruled by that of John Waner (15 L. D., 356).

Waner's entry embraced the NW. $\frac{1}{4}$ of Sec. 27, T. 12 N., R. 1 E. This land was not ceded to the United States by the Cheyenne and Arapaho tribes. It was not disposed of under the act of March 3, 1891 (*supra*), but under the act of May 2, 1890 (26 Stat., 81). The provision in reference to the disposal of these lands is as follows (page 90):

The lands within said Territory of Oklahoma acquired by cession of the Muscogee (or Creek) nation of Indians, confirmed by act of Congress approved March 1, 1889, and also the lands acquired in pursuance of an agreement with the Seminole nation of Indians by release and conveyance dated March 16, 1889, which may hereafter be

open to settlement, shall be disposed of under the provisions of Sections 12, 13, and 14 of the act * * * approved March 2, 1889, and under section 2 of an act to ratify and confirm an agreement with the Muscogee (or Creek) nation of Indians in the Indian Territory, and for other purposes, approved March 1, 1889.

We are thus compelled to refer to "the provisions of sections 12, 13, and 14 of the act" of March 2, 1889, to find the law under which the land was disposed of that Waner applied to enter.

On turning to that act we find the following proviso to section 13 (25 Stat., 980-1005):

Provided further, That any person who made entry under what is known as the commuted provision of the homestead law shall be qualified to make a homestead entry upon said lands.

Waner, therefore, was allowed to make entry because he applied to enter land that might be disposed of to one who had commuted a homestead entry, while Talmadge applies to enter land that can be disposed of only under the provisions of the homestead and townsite laws.

The case at bar, moreover, should be distinguished from that of James H. Henry (17 L. D., 543), who was allowed to make entry for lands lying within the former Cheyenne and Arapahoe reservation. Henry applied to enter the NE. $\frac{1}{4}$ of Sec. 35, T. 17 N., R. 8 W. This land lies within the former Cheyenne and Arapahoe reservation—as does that of Talmadge; but the following difference exists: The land applied for by Henry lies in the "west half" of the domain ceded by the Muscogee (or Creek) nation of Indians to the United States by the article of cession and agreement made and concluded at the city of Washington, on January 19, 1889 (See 25 Stat., 757-8; and, for boundaries, the treaty concluded August 7, proclaimed August 28, 1856—11 Stat., 699-700.)

Now, the lands acquired from the Muscogee (or Creek) Indians by "articles of cession and agreement made and concluded at the city of Washington on the 19th day of January, 1889" (which includes that applied for by Henry, *supra*), may be entered by any person (otherwise qualified) who has "made entry under what is known as the commuted provision of the homestead law" (25 Stat., 1005).

But in the case at bar, the land applied for by Talmadge, although within the Cheyenne and Arapahoe reservation, does *not* lie within that portion thereof ceded to the United States by the Muscogee (or Creek) Indians by the treaty of January 19, 1889. The land so called all lies north of the Canadian river (see 11 Stat., 699-700, *supra*); while the land which Talmadge applies for lies south of said river. It is situated (as hereinbefore stated) within the limits described in the act of March 3, 1891 (26 Stat., 1022), and is subject to entry only "under the provisions of the homestead and townsite laws" (*ib.*, 1026).

I therefore concur in the conclusion of your office that his application can not properly be allowed, and affirm your office decision rejecting the same.

PRACTICE—MOTION FOR RE-REVIEW—RULE 114.

AUGUR *v.* MCGUIRE.

A motion to reconsider a decision that was rendered on review and reversed a former decision, is a motion for re-review and must be disposed of under amended rule 114 of practice.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (W. F. M.)

On February 23, 1891, Francis H. McGuire filed soldier's declaratory statement for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 23, township 47 N., range 9 W., of the Ashland, Wisconsin, land district.

On March 11, 1891, Joseph Augur filed an affidavit of contest, alleging that McGuire had no settlement or improvements on the land.

The case having, in due course of procedure, reached this Department, a decision was rendered here on April 19, 1893, and reported in 16 L. D., p. 372, holding McGuire's declaratory statement for cancellation, and awarding a preference right of entry to the contestant Augur.

The case was, upon motion, reconsidered on review, whereupon, on December 19, 1893, a further decision was rendered, and reported in 17 L. D., p. 569, "recalling and setting aside" the former decision, and directing that McGuire "be permitted to make entry for the land in question under his soldier's declaratory statement."

Now comes the contestant, Joseph Augur, with a further motion for review, urging numerous specifications of error, against the consideration of which the defendant formally protests, and asks that it be sent to the files without further action.

Amended practice rule 114 provides that "motions for a re-review, or a second reconsideration of a decision, shall not be received or filed."

The preliminary question to be determined, therefore, is whether the motion last presented is one for review, or re-review; or, to state it generally, whether a decision having been reconsidered on review and thereupon revoked and reversed, a motion to reconsider the decision in reversal is one for review, or re-review.

Practice rule 76 is, I think, pertinent to the discussion.

Motions for rehearing before registers and receivers, or for review or reconsideration of the decisions of the Commissioner or Secretary, will be allowed in accordance with legal principles applicable to motions for new trials at law, after due notice to the opposing party.

If this rule means anything it is that motions for rehearing before registers and receivers shall be governed by the principles applicable to motions for new trials at law, and that motions for review of the decisions of the Commissioner and Secretary shall be governed by the rules applicable to motions for rehearing in the courts. It is plain that what is denominated a rehearing here is merely the technical new trial

of the law courts of original jurisdiction, and our review is the rehearing of the law courts of appellate and final jurisdiction. We must look to the rules of the courts and the practice acts, therefore, for the law regulating motions for review before this Department, and I know of no judiciary system anywhere in this country which tolerates a second motion for rehearing before the court of last resort established thereunder, and this, too, regardless of the question whether or not the original decision was changed, modified or reversed.

It is true that our rules upon the subject-matter speak of motions for review, re-review and reconsideration of *decisions*, but it is a pitiful trifling with the question to pretend that we here review decisions rather than *cases*.

The Department sometimes modifies, revokes or reverses a decision, but the review, when allowed, is always directed to the *case*.

A rehearing, at law, is defined to be "a second consideration which the court gives a *cause* on a second argument," and while this second argument and consideration may not extend to the whole case, but only to controverted points specially assigned, nevertheless, no advantage lies in favor of either or any party to the controversy. The proceeding is in the strictest sense a contradictory one, and the freest and fullest latitude of argument and discussion is afforded to all the parties.

There is no pretense that the motion under consideration is the "duly verified petition" authorized by the amended rule, but, on the contrary, contestant's counsel insist that it is, strictly and technically, a motion for review, and having reached the conclusion that according to the "legal principles applicable to motions for new trials at law," it is not allowable as a motion for review, I shall remit it to the files without further action.

SMITH v. JOHNSON ET AL.

Motion for review of departmental decision of October 18, 1893, 17 L. D., 454, denied by Secretary Smith, April 16, 1894.

PRACTICE—MOTION FOR REHEARING—RULE 48—SETTLEMENT.

HOBBS v. GOULETTE ET AL.

A motion for rehearing filed before the General Land Office, but transmitted without action on the appeal of the other party, should be remanded for the consideration of the Commissioner, but, if not so remanded, may be treated as protecting the right of the applicant to be heard before the Department.

Failure to appeal from the decision of the local officers leaves their finding of facts final, subject only to review as provided in rule 48 of practice.

Settlement on lands opened to entry by the act of June 20, 1890, is authorized after the beginning of the calendar day on which said lands were opened to settlement.

Secretary Smith to the Commissioner of the General Land Office, April 16, 1894. (J. I. H.) (G. B. G.)

I have considered the consolidated causes of Theodore Hobbs *v.* John B. Goulette, *et al.*, involving the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lots 2, 6 and 7, and Francis R. Clough *v.* Phillip S. Custard, *et al.*, involving lots 5 and 6, and Thomas J. Kiley *v.* C. R. Miller, *et al.*, involving lots 2 and 3, all of Sec. 28, T. 40 N., R. 9 W., Eau Claire land district, Wisconsin.

The land in controversy was withdrawn from the market for reservoir purposes, but was restored to the public domain, and made subject to entry under the homestead law on December 20, 1890, by section three of the act approved June 20, 1890, (26 Stat., 169) entitled an "Act to authorize the President of the United States to cause certain lands heretofore withdrawn from market for reservoir purposes, to be restored to the public domain, subject to entry under the homestead law, with certain restrictions."

The third section of said act provides—

That no right of any kind shall attach by reason of settlement or by squatting, upon any of the lands hereinbefore described, before the day on which such lands shall be subject to homestead entry at the several land offices, and until said lands are open for settlement, no person shall enter upon and occupy the same, and any person violating this provision, shall never be permitted to enter any of said lands, or acquire any title thereto. This act shall take effect six months after its approval by the President of the United States.

John B. Goulette made homestead entry No. 6822, for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lots 6 and 7, December 20, 1890.

C. R. Miller made homestead entry No. 6823, for lots 2, 3 and 5 December 20, 1890, but relinquished his said entry, and the same was cancelled by the local officers January 5, 1892, and he is not now a party in interest.

Hobbs initiated contest, and asserted right to the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lots 2 and 7, based upon his claim of prior settlement, and conflicts with Goulette and Kiley as to the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, with Kiley as to lot 2, and with Goulette and Clough as to lot 7.

Clough initiated contest and asserted right to lots 5, 6 and 7, based upon his claim of prior settlement, and conflicts with Custard as to lot 5, with Custard and Goulette as to lot 6, and with Hobbs and Goulette as to lot 7.

Kiley initiated contest and asserted right to the NE. $\frac{1}{4}$, of the NW. $\frac{1}{4}$ and lots 2 and 3, based upon his claim of prior settlement, and conflicts with Hobbs and Goulette as to the NE. $\frac{1}{4}$, of the NW. $\frac{1}{4}$, with Hobbs as to lot 2, and originally with Miller as to lot 3, but Miller no longer being a party in interest, there is now no controversy as to lot 3.

All of the parties are applicants for the lands under the homestead law, and each entered a general appearance and adduced testimony upon the issue raised at the hearing, had July 15, 1891.

The register and receiver awarded, to Hobbs, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 7; to Custard, lots 5 and 6 (all that he claimed); to Kiley, lots 2 and 3.

Clough and Kiley appealed, and acting on the suggestion of the register and receiver, your office consolidated the foregoing causes, and on the 21st day of June, 1892, after reviewing the consolidated causes, your office modified the finding of the register and receiver, awarding to Hobbs, lot 2; to Clough, lot 7; to Goulette, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$; to Custard, lots 5 and 6; to Kiley, lot 3.

From so much of your office decision as denies to Thomas J. Kiley the right to make homestead entry for lot 2 and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the said Kiley appeals.

It appears further, that within the time allowed for appeal to the Department, and when the case was still within the jurisdiction of your office, contestant Hobbs filed a motion for a new hearing in that branch of the case, known as the case of Theodore Hobbs *v.* John S. Goulette, *et al.*, on the ground of newly discovered evidence, which motion, it appears, was never formally disposed of by your office, but Hobbs entered a motion before the Secretary, asking that the cause be remanded, in order that the Commissioner might pass on said motion, which was denied by the Secretary on February 13, 1893, he holding that the case might be treated as though the Commissioner had overruled the motion for a rehearing. Hobbs has never appealed from your office decision, but more than sixty days after the time he acknowledged notice of said decision, and more than sixty days subsequent to the date of the ruling of the Secretary that the case should be treated as though the Commissioner had overruled the motion for a rehearing, counsel for Hobbs filed an argument here for said contestant, and asked that he be considered here as on appeal, and that contestant's motion for a rehearing be treated as an original proposition, it never having, in fact, been passed on by your office.

This presents an anomalous case, and I have been unable to find any governing precedent. The question presents itself, is Hobbs entitled to a hearing before the Department?

Rule 86 of Practice provides that "Notice of an appeal from the Commissioner's decision, must be filed in the General Land Office, and served on the appellee, or his counsel, within sixty days of the service of notice of such decision."

Rule 87 provides for additional time under certain circumstances, but has no application to the question at issue in this case.

Rule 90, provides that "A failure to file a specification of errors within the time required, will be treated as a waiver of the right of appeal, and the case will be considered closed," and the time within which a specification of errors may be filed, is fixed by Rule 88, "within the time allowed for giving notice of appeal."

Rule 79 provides that "the time between the filing of a motion for rehearing or review, and the notice of the decision upon such motion,

shall be excluded in computing the time allowed for appeal." It follows that a decision cannot be reached in this question, without violating at least one of the foregoing rules of practice. Hobbs gave no notice of appeal, and filed no formal specification of errors, as required by Rule 90, and yet he has had no notice of the decision of your office on his motion for a rehearing, as is required by Rule 79, and he is not required under the rules to file notice of appeal and formal specification of errors until he has received notice of the overruling of his motion for a rehearing.

The Secretary's decision, overruling the motion of Hobbs to remand the cause to your office for a decision on the motion for a rehearing, and holding that said motion might be treated as in effect overruled, would operate as constructive notice, but constructive notice of a decision has never, so far as I can determine, been recognized by the Department.

It would seem that the Secretary erred in denying contestant's motion to remand the cause to your office for formal action on the motion for a rehearing, and at this time this course would appear the only one consistent with the rules of practice. But hoping to avoid the delay that would necessarily follow if such a course were taken, I have gone into the merits of contestant's motion for a rehearing, and find that it should have been denied by your office, for the reason that the newly-discovered evidence offered is largely cumulative, and further, it does not appear that it could not have been discovered by the exercise of proper diligence before the trial, nor is it of such positive character as would necessarily change the result.

"A motion for rehearing, on the ground of newly discovered evidence, will not be granted unless it appears that the alleged evidence would warrant a change of judgment." *Forbes v. Cole* (13 L. D., 726). It follows then, that contestant's motion for a new trial will be overruled, but his right of appeal is protected, and the cause will be treated as of an appeal of both Kiley and Hobbs.

The case at bar presents another unusual feature.

The local officers found *as a fact* that the settlement of Hobbs in the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, preceded the entry of Goulette, and awarded to him that 40-acre tract. Goulette did not appeal, but your office, reversed this finding of the register and receiver, and awarded the tract to Goulette.

Rule 48 provides that in case of a failure to appeal from the decision of the local officers, their decision will be considered final as to the facts, and will be disturbed by the Commissioner only on certain conditions, none of which exist in this case.

The Department insists on an observance of this rule, especially as between adverse claimants. See *Lindgreen v. Boo* (7 L. D., 98); *Swims v. Ward* (13 L. D., 686); *Hazard v. Swain* (14 L. D., 230).

The case as to Goulette, should have been treated by your office as closed at the expiration of the time for appeal from the decision of the

local officers, and the case will be considered here as though this had been done, and his said homestead entry No. 1822 will be canceled.

The local officers awarded lot 2 to Kiley, and since Hobbs did not appeal from that part of their decision, his claim to said lot should not have been considered by your office, and will not be considered here.

The unsettled conflicts of claims to be considered by the Department, are as follows:

Hobbs asserts claim to the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, conflicting with Kiley, and to lot 7, conflicting with Clough. There is no conflict between Clough and Kiley. These tracts are contended for by the parties all under a claim of prior settlement.

The facts of settlement, as set forth in your office decision, are substantially correct, and are as follows:

Hobbs settled upon lot 7 at 9 o'clock precisely, on the morning of December 20, 1890, by going there and cutting some brush and logs, and making a clearing, and fixing the foundation for a house.

Clough entered upon lot 7 between 7 and 8 o'clock of the morning of December 20, 1890, in company with Kiley and one Murphy, cut some brush near an old shanty that had been left for several years, and announced that "here I will take this shanty, fix it up and make it an improvement," and then left for the purpose of engaging one Peltier to help him work on the land, and returned to the land with Peltier at 9 o'clock of the same day. Both Hobbs and Clough afterwards built houses on the land, Hobbs moving his family there January 6, 1891, and Clough his family January 14, 1891, and both have since resided on this lot in apparent good faith.

Hobbs' hope of having this land awarded him rested primarily on an erroneous interpretation of the act opening it to settlement, he assuming that settlement prior to 9 o'clock a. m., of December 20, 1890, was not only unauthorized, but that any such attempted act of settlement would forfeit all right to enter the same land by the offending party. This view of the law has since been exploded in the case of *Johnson v. Crawford* (15 L. D., 302), and on review, in *Gillen v. Beebe et al.* (16 L. D., 306). Since the promulgation of the opinion of *Johnson v. Crawford* (*supra*) Hobbs' hope of recovery has been based on a motion for a rehearing. This has been already disposed of.

The claim of Clough to this lot must prevail since he is unquestionably the prior settler.

Hobbs entered upon the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ at 9.20 o'clock, cleared a small piece, and piled the brush, and left at 9.40 o'clock. It does not appear that Kiley went on this tract that day, but it would seem that he relies more on the state of the record herein to succeed in his claim for this land, than from any rights he has in the premises. It will be remembered that this is the same tract originally contended for by Hobbs, Goulette and Kiley, and that the local officers awarded it to Hobbs. Kiley appealed, and the case should have been treated as

closed to Goulette, for failing to appeal and is now so considered. Your office decision in violation of Rule 48, hereinbefore referred to, awarded this tract to Goulette, and for the first time Hobbs had something to complain of on this issue.

Kiley appeals to the Department, and Hobbs is treated as an appellant, for reasons hereinbefore specifically set out. I find that Hobbs is the prior settler on this lot, and it is so awarded to him.

Hobbs will be allowed to make entry for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$; Clough, for lot 7; Custard, for lots 5 and 6, and Kiley, for lots 2 and 3.

Your office decision of June 21, 1892, is modified, as herein indicated, and the cause is remanded for proceedings consistent with this opinion.

COAL LAND ENTRY—QUALIFICATIONS.

WILLIAM H. McCONNELL.

An applicant for the right to make an entry of coal land is not disqualified by his having been, previously to such application, the owner and intermediate assignor of a preference right to enter other coal lands.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (G. B. G.)

From your office decision of October 17, 1892, holding William H. McConnell's coal entry of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 6, T. 31 S., R. 65 W., and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 1, T. 31 S., R. 66 W., Pueblo land district, Colorado, for cancellation, the entryman has appealed, assigning as error:

1st. In holding that paragraph 37 of rules and regulations, relative to the sale of coal lands, recognizing assignments, has no authority of law.

2d. In deciding that the holding of an assignment under that paragraph is the exercise of the right of purchase, given by law.

3d. In holding coal entry No. 206 for cancellation.

It appears from the record before me that on August 15, 1889, one Juan B. Romero filed his coal declaratory statement for said land, under section 2348, Revised Statutes, alleging continuous possession of same tract since June 18, preceding.

On November 1, 1889, he sold and assigned his preference right thus acquired, to McConnell, who, on September 5, 1890, made cash entry of said tract by his attorney in fact. By said letter of October 17, 1892, your office states that on the same day that Romero assigned his preference right to McConnell, one Fannie H. Priest also assigned to him her preference right for the NW. $\frac{1}{4}$ of Sec. 6, T. 31 S., R. 65 W., and that McConnell, instead of completing this entry, assigned the right to one Henry O. Peabody, who, on July 29, 1890, made final entry of the land, and the same was patented April 8, 1891. "It thus appears that on November 1, 1889, said McConnell was in possession of two separate preference rights to purchase," one of which he assigned to

Peabody, and the other, the entry now under consideration. Under this state of facts, your office held "that a person assigning a preference right of purchase or entry, cannot thereafter avail himself of a second assignment, or even make another coal filing." It is from this decision that the entryman appeals.

The facts as stated by your office are not disputed. In reference to the first assignment of error, it is only necessary to say that section 2351, Revised Statutes, authorizes the Commissioner of the General Land Office to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections, relating to coal entries.

Under this authority, the circular of rules and regulations of July 31, 1882, (1 L. D., 687) was issued, approved by Mr. Secretary Teller. A regulation thus made has all the force and effect of a statute. * (Albert Eiseman, 10 L. D., 539).

The further contention by counsel that the rule permitting assignments of the right to purchase, is in violation of law, is not tenable. There is no prohibition in the statute providing for coal entries, against the transfer of the preference right of entry, as in the pre-emption and homestead laws cited by counsel. (See Sections 2347, 2348, 2349, 2350, 2351 and 2352, Revised Statutes). This right is a valuable property right, and independent of a statutory prohibition, may be assigned. (Myers v. Croft, 13 Wall., 291).

By the second specification of error, the ruling of your office is directly brought in question.

Rule 9, of the Rules and Regulations (*supra*) provides *inter alia* that "One person can have the benefit of one entry or filing only. He is disqualified by having made such entry or filing alone, or as a member of an association."

The first sentence of this paragraph is complete in itself, and taken alone, a strict construction would warrant the conclusion of your office in the judgment appealed from, waiving the question of its conflict with the statute on which it is based. But the following sentence of the paragraph quoted, is explanatory of the first, and shows conclusively that by a "person" who has had the "benefit of one entry," is meant a person who has "made such entry or filing," and it is clear that by the "benefit" referred to in the first sentence, the assumed benefit arising from the assignment of an entry or filing, was not contemplated. Indeed, if it were otherwise, the regulation itself would be in contravention of the statute, and therefore void.

Section 2349 (*supra*) provides, among other things, that every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, . . . shall, upon application to the register of the proper land office, have the right to enter by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres.

Section 2348 provides for preference right of entry of coal lands, based on the performance of certain conditions precedent, and section 2349 provides the method of procedure for the presentation of claims under the preceding section, neither of which are important in determining the issue under consideration in the case at bar.

Section 2350 provides that "The three preceding sections shall be held to authorize only one entry by the same person."

The prerequisite qualifications thus provided for by statute, are: 1st. The applicant must be above the age of twenty-one years. 2d. He must be a citizen of the United States, or have declared his intention to become such. And by section 2350, as has been seen, a person so qualified, is limited to one *entry*.

It is therefore held that the appellant is not disqualified from entering the land applied for, by reason of his having been, previous to such application, the owner and the intermediate assignor of a preference right to enter other lands under said act.

It appearing that his proofs are sufficient, the judgment appealed from is reversed, and the cause remanded, with directions that the entry be allowed to remain intact.

HOMESTEAD CONTEST—ABANDONMENT—PLACER LOCATION.

THORNE *v.* KINSEY.

A charge of abandonment against a homestead entry is not sustained by the mere fact that the entryman united with others in locating a placer claim, unauthorized by law, on part of the land covered by his entry.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (W. M. W.)

I have considered the case of William Thorne *v.* Jesse M. Kinsey, upon the appeal of the former from your office decision of May 7, 1892, dismissing his contest against the homestead entry of said Kinsey, for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 6, T. 3 N., R. 70 W., Denver, Colorado, land district.

The record shows that Kinsey made homestead entry for said land on the 7th day of December, 1886. That on September 25, 1889, Thorne filed an affidavit of contest against said entry, alleging that the said: "Jesse M. Kinsey has wholly abandoned said tract as a homestead entry and in connection with others with whom he has associated himself, has filed a placer claim on said land; that said entry was made for speculative purposes and was fraudulent."

A hearing was ordered and had before the local officers at which the parties appeared and submitted the case upon their testimony which had been taken before the clerk of the district court of Boulder county, Colorado. From the evidence, the local officers, in effect, found that as a matter of fact Kinsey had not abandoned the land, but they found that he by his acts in associating himself with others and filing upon the greater portion of the land in controversy, and claiming the same

as a placer claim, therein alleging the discovery of minerals, amounted "to a legal abandonment of his right under his original homestead entry." Their ultimate finding on the question at issue was as follows:

It is true the evidence does not show that claimant has changed his residence or abandoned the land; that he has not departed from the land; he still maintains his home thereon; he has not changed his residence therefrom. But does not the legal presumption arise from his acts in connection with this placer claim that he has abandoned all right to hold and claim this land under the homestead law? Such is our belief, and, thus believing, we will sustain the contest and recommend the cancellation of claimant's homestead entry.

Kinsey appealed.

On May 7, 1892, your office reversed the judgment of the local officers and dismissed the contest.

Thorne appeals.

The burden of proof was on the contestant to sustain by a preponderance of the testimony either the charge of abandonment, or that the entry was made for speculative purposes; as to the latter charge, your office correctly found that there is no evidence to support it. As to the charge of abandonment, the evidence taken at the trial is unsatisfactory. Kinsey testified that he entered the tract for a home, and that at the time he made his entry he had no knowledge of the existence of mineral or stone upon the land covered by his entry. In April, 1889, he opened a stone quarry, and in September, 1889, he and four others located one hundred acres of the land embraced in his entry, as a placer claim.

The location as a placer for the kind of stone found in the tract was invalid and not warranted by the law as it stood at that time. *Conlin v. Kelley* (12 L. D., 1). The acts of Kinsey *et al.* in making out, signing and recording the placer location were not of themselves sufficient to satisfactorily show that Kinsey thereby abandoned his former homestead entry for the land.

If Kinsey can show that in joining in the placer location, he acted under the mistaken belief that the land was subject to mineral entry, or that the stone it contained excepted it from his agricultural entry, and that in so joining in the placer location it was his sole object and purpose to secure the land embraced in his homestead for a home to the exclusion of one elsewhere then I think his entry should be upheld. The evidence taken at the trial on these propositions is too indefinite and meager to justify final determination on this branch of the case. You will, therefore, cause a hearing to be had under the rules of practice at which the parties will be permitted to submit such testimony as they may see fit touching this branch of the case. Upon the testimony taken thereat the local officers will readjudicate the case in conformity to the views herein expressed and the case will take its usual course.

The decision appealed from is accordingly modified.

SURVEY—AGRICULTURAL CLAIM—MINERAL LAND.

WALTER BOND.

A survey to determine the area of an alleged agricultural tract, made fractional by adjacent mineral claims, may be allowed on the ex parte application of a settler.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (R. B.)

This is a petition by Walter Bond to have the record of the proceedings in the matter of his application for survey of fractional SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 18, T. 16 N., R. 9 E., M. D. M., Sacramento, California, and of his homestead application for the same tract, certified under rules 82 and 83 of practice, to this Department for consideration.

Along with the said petition your office transmits copies of the official correspondence in relation to the case. From said petition and correspondence the following facts are gathered.

On June 1, 1891, Bond presented his application to make homestead entry for—

The fractional SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, of section 18, in township 16 north, of range 9 east, M. D. B. and M.; lying between north extension of Pittsburgh quartz mining claim; bounded on the west by the west boundary line of said section 18, Tp. 16 N., R. 9 E., M. D. B. and M.; on the north by the Gold Flat quartz mining claim and on the south and west by the north extension of Pittsburgh quartz mining claim; containing 3 acres.

This application was rejected by the receiver because the acreage of the lot applied for was undetermined and could not be obtained from the surveyor-general's office.

On June 30, 1891, Bond filed with the surveyor-general his application for a special survey of said lot, together with his affidavit "as to residence on said land and reciting the reason why his entry had been rejected." In the pending petition Bond alleges that "he is now and has been for more than five years last past a *bona fide* settler" on the land and that he has placed "improvements of great value thereon."

Under date of July 3, 1891, the surveyor-general replied that he had no authority to order a survey of the said character and suggested a segregation survey under paragraph 102 *et seq.* of U. S. Mining Laws and Regulations and stated that on October 24, 1885, he had notified your office that no areas of the legal subdivisions made fractional by the mineral surveys in the SW. $\frac{1}{4}$ of said section could be given on account of disagreements in the surveys.

Subsequently, the local officers transmitted the papers to your office with a request by Bond that the surveyor-general be directed to make the survey. Thereupon, by letter dated October 3, 1891, your office sent the papers in the case to the surveyor-general for report.

By letter dated October 10, 1891, the surveyor-general reported that—

He did not consider it advisable or practicable for the government to make the survey desired by Mr. Bond, believing that a survey, *if made by the government* would open a precedent for like surveys in very many of the mineral districts of the State.

On receipt of the said letter from the surveyor-general, your office by letter dated December 21, 1891, advised the local officers that the application of Bond for the survey of the described fraction was disallowed and also that the segregation survey suggested by that official could not be allowed because—

The segregation surveys contemplated by the official regulations referred to are permissible only in contested cases; after hearings have been had to establish the character of the lands, and to segregate the mineral from the agricultural land in any forty acre tract.

On November 25, 1892, your office denied an appeal taken by Bond from the refusal of his application for survey, for the reason that the allowance of survey was a matter within your discretion and consequently an appeal would not lie. Rule 81 of practice.

It is, of course, a discretionary matter with the land department whether the public surveys should be extended over a specific tract of land and an appeal will not lie from the Commissioner's refusal to allow an application for such action. *E. Y. Brashears et al.* (16 L. D., 513). And certiorari will not lie if the appeal is not wrongfully denied, unless the facts set forth show that the applicant is entitled to relief under the supervisory authority of the Secretary. *Nichols v. Carlson* (15 L. D., 126). In this case the applicant for survey continuously inhabited and improved the land with the manifest intention of entering it under the homestead laws. His application to enter the same was denied because its acreage can not be determined by existing surveys and his application for survey to determine such acreage was denied by your office because he is not a party "to a contest." This, in my opinion, is error. The regulations under the mining laws approved December 10, 1891, provide (Rule 114) in a contested case—

When the case comes before this office, such decision will be made as the law and the facts may justify, and in cases where a survey is necessary to set apart the mineral from the agricultural land, the necessary instructions will be given to enable the proper party, *at his own expense*, to have the work done, at his option, either by United States deputy, county, or other local surveyor; the survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section 2320 U. S. Revised Statutes, as to length and width and parallel end lines.

In this case the applicant shows *prima facie* that he has acquired a settlement right to the tract he seeks to enter under the homestead laws. This being so he is, I think, entitled to relief under the supervisory authority of the Department and the fact that his application for survey is pending *ex parte* and is not the subject of controversy, does not warrant its denial.

In view of this conclusion I can see no reason why the delay attendant upon certification under rules 82 and 83 of practice should not be avoided and judgment rendered on the papers before me.

Your office is accordingly directed to allow, in accordance with the regulations cited, Bond's said application for survey of the tract in question, and when the plat of such survey is filed in the local office Bond will be permitted to so amend his homestead application as to properly describe the land in question and to enter the same.

DESERT LAND CONTEST—SUSPENDED ENTRY.

RUSSELL v. HAGGIN.

An allegation, in an affidavit of contest against a desert entry, equivalent to a charge of illegality in that the land was non-desert at date of entry, is sufficient to warrant a hearing.

The period of time during which a desert entry is suspended by a departmental order should be excluded from the time accorded by the statute for reclamation; and failure to reclaim during such period of suspension affords no ground of contest.

Secretary Smith to the Commissioner of the General Land Office, April 16,
(J. I. H.) 1894. (C. W. P.)

I have considered the appeal of Clarence W. Russell from your office decision of October 3, 1892, rejecting his application to contest the desert land entry of Louis T. Haggin of April 19, 1877, for the W. $\frac{1}{2}$ and the NE. $\frac{1}{4}$ of Sec. 14, T. 29 S., R. 26 E., Visalia land district, California.

This application was filed February 19, 1891. The affidavit of contest charges—

That said land was entered by fraud in the inception of said entry; that said land will produce native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons; that said land will produce, without irrigation, a crop of barley, potatoes, or other agricultural crop, in amount to make the cultivation reasonably remunerative; that more than three years have elapsed since said entry was made, and claimant has not conducted water on said land, nor made any ditches or provided any other means of irrigation; that claimant has failed to comply with the law since said entry was made; that, on information and belief, contestant avers that claimant has not acquired any water right that he can use in reclaiming said land.

The charge that the land was entered by fraud in the inception of the entry, should be read in connection with the allegations that the land will produce native grasses, etc., and that it will produce, without irrigation, a crop of barley, potatoes, etc. If the affidavit is so construed, it is equivalent to a charge of illegality in the entry, by reason of its not being desert land at the date of entry, and is sufficient to warrant a contest.

The allegation that the land had not been reclaimed within the statutory period of three years, is premature. The period of time covered by the order of your office of September 28, 1877, suspending Visalia desert land entries, should be excluded from the time accorded by the statute for reclamation. *United States v. Haggin* (12 L. D., 34).

The entry in question was made April 19, 1877, and suspended from the 28th of September, 1877, to the date of the notice of the order of revocation. Application to contest was filed February 19, 1891. It follows that less than one year of the three years allowed Haggin within which he must reclaim the land, had expired at the date of said application.

The allegation that claimant has not acquired any water right, etc. is irrelevant.

As there are two good allegations in the contest affidavit, the decision of your office is reversed, and your office will direct that the application of Clarence W. Russell be allowed.

PRACTICE—NOTICE—APPEAL—HOMESTEAD ENTRY—WIDOW.

THADDEUS M. ARMSTRONG.

A decision is not final as to the rights of the parties therein in the absence of due notice thereof.

An appeal will not be considered if notice thereof is not served on the opposite party.

On the death of a homestead entryman the right to perfect his claim and receive title thereto vests in the widow and not in the heirs.

A marriage in violation of a State law prohibiting divorced persons from marrying within six months from the decree of divorce, may be presumed valid for the protection of a widow, claiming as such under the homestead law, where the homesteader acknowledged her as his wife after said period of six months, and the decree of divorce remains undisturbed, and the subsequent marriage has not been judicially annulled.

Secretary Smith to the Commissioner of the General Land Office, April 16,
(J. I. H.) 1894. (A. E.)

The record of this cause shows that on March 3, 1883, Thaddeus M. Armstrong filed declaratory statement of intention to pre-empt the SW. $\frac{1}{4}$ of Sec. 10, Tp. 8 S., R. 25 W., Oberlin, Kansas, alleging settlement February 26, 1883. On August 6, 1884, he made homestead entry for the same tract.

On May 23, 1888, Cyrus M. Armstrong, claiming to be one of the heirs and for the benefit of all the heirs of Thaddeus M. Armstrong, deceased, made final proof for said tract, swearing that the deceased left no family, and receiving final certificate on May 23, 1888.

On June 20, 1888, Nellie J. Armstrong, claiming to be widow of Thaddeus M. Armstrong, filed an application in the local office to have

the final certificate issued to Cyrus M. Armstrong cancelled, and a new certificate issued to her as widow of deceased entryman; or that a hearing be ordered to determine the rights of the parties. In this application petitioner avers that she was married to deceased on July 7, 1885, and that deceased died February 22, 1888, while petitioner was living apart from him and with her father in Montana. This petition further charges that Cyrus M. Armstrong, the father of deceased entryman, told petitioner, by letter dated January 12, 1888, a copy of which is attached, that her husband had sold his claim, and advised her to get a divorce from him, advising her to send an affidavit that he (the deceased entryman) had mistreated and cruelly treated her, and he (Cyrus M. Armstrong) could furnish her all the evidence she wanted.

Petitioner makes others letters, written to her by Cyrus M. Armstrong shortly before entryman's death, a part of her petition, showing his desire that she should get a divorce from his son, the entryman since deceased, and his promise to help her. She likewise charges that Cyrus M. Armstrong circulated the report that she was dead, and by means of such false representations made final proof of the land as one of the heirs.

Attached to this petition was a power appointing and authorizing Owen R. Fogan and S. D. Decker, Oberlin, Kansas, as her attorneys to represent her interests, and giving her own address as Oberlin, Kansas.

On July 27, 1888, Cyrus M. Armstrong was arrested for perjury, committed in making the final proof on May 23, 1888, and held by the United States Commissioner at Oberlin on bail to await the action of the U. S. grand jury.

By office letter ("C") of November 7, 1888, your office ordered that Cyrus M. Armstrong show cause why the claim of petitioner Nellie J. Armstrong should not be recognized. In reply to this, Armstrong stated, in his answer, that on May 8, 1883, Thaddeus M. Armstrong, deceased, was married to one Nettie N. Winters, in Smith county, Kansas; that there was born of said marriage one child, known as Milton J. Armstrong, who was over five years of age; that Thaddeus N. Armstrong obtained a divorce from Nettie M. Armstrong, the mother of this child, at the May term, 1885, of the district court of Graham county, and that on July 7, 1885, said Thaddeus N. Armstrong married Nellie J. Wheeler, the petitioner, who after living with him a few months left him and did not again live with him; that before his death Thaddeus M. Armstrong, the deceased, filed petition in the district court for a divorce from said Nellie J. Armstrong, but at the time of his said death it was unacted upon.

The respondent then claims that the marriage of Armstrong, deceased, and Nellie J. Wheeler, petitioner, is void, because the statute of Kansas provides that it shall be unlawful for divorced persons to marry until six months have expired after the date of the divorce.

After consideration of this, your office by letter ("P"), dated March 6, 1891, held that Cyrus M. Armstrong was not one of the heirs of the deceased entryman, and that the final proof made by him, as such, was fraudulent, and the proof was rejected and Nellie J. Armstrong, who claims to be the widow of the deceased claimant, would be allowed to submit new proof showing claimant's compliance with the law and her legal marriage to him, and that should she not make, or refuse to offer, final proof in support of her claim within a reasonable time, then the duly appointed guardian of the minor child or children, if any, would be allowed to submit final proof.

To carry out the instructions of this decision, the local officers on May 6, 1891, sent a registered letter, addressed to Mrs. Nellie J. Armstrong, Fremont, Kansas, notifying her of the above decision of your office, and informing her that she would be allowed thirty days in which to comply with its requirements. This was returned unclaimed, and Cyrus M. Armstrong, claiming authority by reason of what purported to be an order of the probate court appointing him guardian of Milton J. Armstrong, alleged minor child of deceased entryman, was allowed to make final proof on October 13, 1891, and another certificate issued to him, the first certificate issued to him as one of the heirs, being returned and forwarded to your office, with the last taken proof, November 2, 1891.

This was the first error committed by the local office, and it is difficult to understand the reason for it. At the time the letter was sent to Nellie J. Armstrong, at Fremont, she had attorneys of record whose address was Oberlin, Kansas, and had her own address on record, and this was Oberlin, the very place where the land office was located.

By your office letter ("P") of January 11, 1892, the final proof made by Armstrong as guardian was suspended, and the local office notified to make every effort to find the widow of the deceased entryman, and send a copy of your office letter of March 6, 1891, by registered mail, to said widow advising her that she would be allowed a reasonable time within which to make final proof on said entry.

On March 18, 1892, the local office reported that registered letter had been sent to Nettie Waldin, at Burlington, Iowa, and the return card showing the receipt of the letter was signed "Nettie May Waldin, by B. A. Waldin;" that thirty days had elapsed, but Nettie May Waldin had not offered any proof. This was the second error committed in this case, and there was no more excuse for it than for the previous one. Instead of sending a letter to Nettie May Waldin, presumably the divorced wife of the dead entryman, and one having no rights whatever in the premises, and who was not properly a party to the record, the instructions of your office letter should have been served on the attorneys of Nellie J. Armstrong, who were of record and lived in Oberlin, where the land office was situated.

With this letter of March 18, 1892, the local office transmitted a certified copy of the records of the probate court of Graham county, Kan.

sas, showing that on May 18, 1885, Thaddeus M. Armstrong and Nettie M. Armstrong, father and mother of Milton J. Armstrong, in open court relinquished said child, and the court decreed that thereafter the said Milton J. Armstrong was the child of one Julia Armstrong. These proceedings appear regular and legal, and within the jurisdiction of the court.

By your office letter ("P") of June 16, 1892, the entry in controversy is held for cancellation, subject to a right of appeal within sixty days. This is done in words following:

I am now in receipt of your letter of March 18, 1892, transmitting registry return receipt signed 'Nettie May Waldin, by B. A. Waldin,' and reporting that said Nettie Waldin was duly notified as instructed, in said letter 'P' of January 11, 1892, and that in more than thirty days had expired without any action being taken by her.

In view of the foregoing, said final homestead entry No. 1310, made May 23, 1888, for the SW. $\frac{1}{4}$ of section 10, T. 8 S., R. 25 W., and said final homestead entry No. 3761, made October 13, 1891, both based on original homestead entry No. 874, are hereby held for cancellation.

There is nothing to show this decision was ever served upon the attorneys of Nellie J. Armstrong, who were of record as aforesaid.

On November 26, 1892, Cyrus M. Armstrong, as guardian of Milton J. Armstrong, filed an appeal, and there is nothing to show this was ever served upon Nellie J. Armstrong, or her attorneys of record, but a postmaster's receipt is attached to this appeal, showing a letter was registered to one Nellie J. Armstrong, at Fremont, Kansas, and an affidavit to the effect that a copy of the appeal was mailed.

It appearing that Nellie J. Armstrong, who claims to be the widow of the deceased entryman, has never been duly notified of your office decisions, or of this appeal, the same is dismissed, and the decision of June 16, 1892, holding for cancellation final homestead entry No. 1310, made May 23, 1888, by Cyrus M. Armstrong, as heir, and final homestead entry No. 3761, made October 13, 1891, by said Armstrong as guardian, is modified as follows:

(1) You will cancel the final homestead entry No. 1310, made May 23, 1888, by Cyrus M. Armstrong, as heir.

(2) You will not cancel the final homestead entry No. 3761, made October 13, 1891, by said Armstrong, as guardian, but suspend action on the same pending the result of the following instructions.

(3) You will cause Nellie J. Armstrong to be properly notified of your office decisions of March 6, 1891, June 16, 1892, and of this decision, and allow her a reasonable time after notice within which to assert her claim as widow.

(4) Should Nellie J. Armstrong fail to qualify or make final proof within the time required, which will not be less than thirty days, you will cause notice to be served personally upon the minor child, Milton J. Armstrong, also on his legal or foster mother, also on his natural mother, the divorced wife of dead entryman, and also on his guardian of record and not take final action until it is established which of these is the proper guardian by the State law of said minor.

Special Agent McKenney, in a report on this case, states that the local office decided that the marriage between the deceased entryman and Nellie J. Armstrong was void, but that such a decision was an error.

There is nothing in the record transmitted to this office showing such action by the local office, and if such a decision were made, it is of no effect.

At the time of Armstrong's marriage to Nellie J. Wheeler, the claimant in this cause, a statute of Kansas provided that it should be unlawful for any party to a decree of divorce made by a trial court to marry within six months after the rendering of the decree. In view of the fact, however, that Armstrong, though marrying Nellie J. Wheeler before six months had elapsed from the date of the decree dissolving his former marriage, acknowledged her as his wife after the six months, and, in the absence of any judgment of a Kansas court, either reversing the decree aforesaid or declaring the subsequent marriage void, this Department will presume it valid, and accept Nellie J. Armstrong as the legal widow of the deceased entryman.

TYLER v. VAN LEUYEN.

In the case above entitled, decided by the Department March 11, 1893 (16 L. D., 280) a rehearing is ordered by Secretary Smith, April 16, 1894.

TIMBER CULTURE ENTRY—SPECIAL AGENT.

WALKER v. PROSSER (On Review).

A timber culture entry made by a special agent of the General Land Office is invalid, under the provisions of section 452 R. S., and must be canceled.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (E. M. R.)

By your letter of September 6, 1893, you transmitted a motion for review upon the part of the contestant in the case of Walker v. Prosser, decided by this Department July 7, 1893, and reported in 17 L. D., page 85.

October 18, 1882, William F. Prosser made timber-culture entry for lots 1, 2, 6, 8 and 10, Sec. 2, T. 8 N., R. 24 E., North Yakima land district, Washington.

October 28, 1889, John A. Walker filed an affidavit of contest alleging *inter alia* that Prosser was disqualified to make timber culture entry, because at the time he made it he was a special agent of the

government, appointed by the Commissioner of the General Land Office.

The register and receiver recommended the cancellation of the entry on the ground of disqualification. Upon appeal to your office, the decision below was sustained and upon further appeal, the departmental decision before referred to, reversed the conclusions heretofore reached and dismissed the contest and allowed the entry to remain intact.

The motion for review raises two questions: the qualification of the entryman and the alleged non-compliance with the timber-culture law. In view of the conclusion herein reached upon the first exception, it will be unnecessary to consider the second.

Section 452 of the Revised Statutes provides that—

The officers, clerks and employes in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office.

The first legislation upon this subject was that of April 25, 1812 (2 Stat., 717), and this was followed by the act of July 4, 1836 (5 Stat., 107), out of which the section grew that is quoted above.

The language used in the statute is plain and unambiguous and the disqualification is absolute and this Department heretofore has so construed it.

In the case of the State of Nebraska *v. Dorrington et al.*, (3 Copp's Land Owner, 122), Secretary Chandler held that—

Registers and receivers and their clerks and employes and all persons intimately or confidentially connected with such officers or employes, are prohibited from making entries of the public lands at the offices with which they are connected.

August 23, 1876, a circular was addressed to the registers and receivers by the Commissioner of the General Land Office as follows:

Pursuant to instructions from the Hon. Secretary of the Interior of the 3d instant, you are hereby advised that the registers and receivers, and their clerks and employes, and those intimately and confidentially related to the registers and receivers, their clerks and employes, will not be permitted, under any circumstances, to make any entries of public lands at the district offices over which they respectively have control, or in which they are respectively employed; and that upon satisfactory proof that this regulation has been violated, the officer offending will be reported to the Executive for removal.

This regulation is not intended to apply to cases provided for in section 2287 of the Revised Statutes of the United States, where parties initiate claims under the pre-emption or homestead laws, and are subsequently appointed registers or receivers.

In *Grandy v. Bedell* (2 L. D., 314), the syllabus is:

As the evidence fails to show a substantial compliance with the timber culture laws, in view of the unfavorable weather, the entry is allowed to stand, notwithstanding the party was a clerk in the local land office at date of making entry.

This decision is contrary to the one just before cited and is without the support of prior or subsequent holdings up to the rendering of the one in the case at bar, which it is now sought to have reviewed.

The case (*supra*) has never specifically been set aside and overruled, but in the case of Herbert McMicken *et al.* (10 L. D., 97), Secretary Noble held that—

The disqualification to enter public lands contained in section 452 R. S., extends to officers, clerks and employes in any of the branches of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of public lands.

A timber land entry made by an employe in the office of the surveyor-general of the district in which the land is situated, is illegal and must be canceled.

Subsequently, on a motion for review of the case it was held (11 L. D., page 96), that—

Clerks in the office of the surveyor-general are clerks or employes in the office of the Commissioner of the General Land Office, in contemplation of law, and therefore, under the inhibition of section 452 of the Revised Statutes, disqualified to enter public land.

Directions given for the formulation of a circular in accordance with the construction of law adopted herein.

On September 15, 1890, the circular referred to was issued and was as follows (11 L. D., 348):

Section 452 of the Revised Statutes provides that "the officers, clerks, and employes in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office." The Honorable Secretary of the Interior, in the case of Herbert McMicken *et al.* (10 L. D., 97; 11 L. D., 96), has decided that the disqualifications to enter public lands, contained in said section, extends to officers, clerks, and employes in any of the branches of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of public lands.

In accordance with said decision all officers, clerks, and employes in the offices of the surveyors-general, the local land office and the General Land Office, or any persons, wherever located, employed under the supervision of the Commissioner of the General Land Office, are, during such employment, prohibited from entering, or becoming interested, directly or indirectly, in any of the public lands of the United States.

The statute then has been construed to absolutely disqualify any one employed in the General Land Office whether located in the city of Washington or not, from acquiring any title whatever to any of the public lands during the period in which he is so employed.

In *Winans v. Beidler* (15 L. D., 266), it was held that—

Section 452, R. S., does not prohibit a homesteader from completing title, by due compliance with law, who after making his entry accepts and holds an appointment in the General Land Office that gives him no advantage over the general public in the matter of prosecuting his claim.

A motion for review of this case was denied by Secretary Noble (16 L. D., 66). But in that case the entry was made prior to the time at which the party became an employe. His rights had, to some extent at least, become vested, and the decision (*supra*) allowed him to complete

only that which had been legally initiated. The object of the statute evidently, in disqualifying the employés of the General Land Office was to prevent their use of such knowledge as came to them in an official way, to their private benefit; hence it follows, that an entry made prior to the time of becoming connected with the office should stand for the reason that he did not have, and could not have had, any superior sources of information over his neighbors, and it would be a manifest injustice to destroy the rights of a *bona fide* entryman of the public lands on the ground that subsequently he became an officer or agent of the government in relation to the public lands.

It is urged in behalf of the entryman that he acted under a letter from the Commissioner of the General Land Office, and that under the circumstances, he is entitled to especial consideration. The letter referred to is as follows:

It is held by this office that the case of Mr. Prosser does not come within the inhibition contained in section 452, Revised Statutes, and that a special timber agent may be entitled to the pre-emption privilege, not being employed in the general land office at Washington. The circular of August 23, 1876, issued by this office, under the Hon. Secretary's decision of August 3, 1876 (3 Copps' Land Owner, 122), forbids the entry of public land by clerks and employees in the local land offices, but does not apply to special agents.

That letter was written in reference to another claim of Prosser's and the facts in that case were similar to the case of *Winans v. Beidler* before cited. Prosser had prior to the time of his appointment as special agent made a pre-emption filing and upon his offering final proof subsequent to his becoming an agent, the local officers refused to accept it, and upon the matter being brought to the attention of the Commissioner, the letter quoted was written. Under the facts in the case Prosser was entitled to make final proof, and while the letter of the Commissioner does say that the law did not apply to special agents, as a matter of law it did, and the construction therein given to section 452 R. S. was an error.

When the object of the act is considered, it will be seen that it applied with special force to such parties as the defendant in the cause at issue. As a special agent of the Commissioner of the General Land Office, he was in a position peculiarly adapted to secure such knowledge the use of which it was the intention of the act to prevent.

It follows from what has herein been set out, that the decision of this Department of date July 7, 1893, was in error and the same is hereby set aside; and the decision of your office is affirmed.

RAILROAD GRANT—ADJUSTMENT—PRE-EMPTION FILING.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The act of March 3, 1887, directs the adjustment of railroad grants in accordance with the decisions of the United States Supreme Court, but constitutes the Secretary of the Interior the judge to determine in each specific case whether a demand for reconveyance should be made; and where the particular question involved has not been passed upon by said court, the action of the Secretary can not be delayed therefor.

The fact that a pre-emption filing is made in violation of an executive order for the benefit of a railroad grant, will not relieve said grant from the operation of said filing against the subsequent definite location of the road, where said order has expired by limitation prior to such location.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (F. W. C.)

With your letter of November 20, 1893, was forwarded the answer made by the St. Paul, Minneapolis and Manitoba Railway Company, to the rule served upon said company to show cause why demand should not be made for the reconveyance to the United States of the SW. $\frac{1}{4}$, Sec. 21, T. 119 N., R. 30 W., 5th p. m., and the S. $\frac{1}{2}$, Sec. 11, T. 119 N. R. 31 W., 5th p. m., Marshall land district, Minnesota, as contemplated by the act of March 3, 1887 (24 Stat., 556).

Said tracts are within the six miles, primary limits, of the grant made by the act of March 3, 1857 (11 Stat., 195), to aid in the construction of the main line of said road, the definite location opposite which was shown upon the map filed December 5, 1857.

Prior to said definite location, to wit, on June 22, 1857, the local officers in the several land districts including this grant, were instructed—

Not to allow any pre-emption claims predicated upon a settlement made within four months after receipt of this letter, on any of the lands withdrawn from market, in view of the provisions of the law of March 3rd last, making a grant of land to the Territory of Minnesota for railroad purposes.

The land in question was, at that date, within the Minneapolis land district, at which said order was received on June 30, 1857.

Subsequent to said date and prior to the definite location of the road, pre-emption filings were allowed for the lands in question, based upon settlements alleged prior to June 30, 1857.

These filings were of record, uncanceled and subsisting claims to the lands at the date of the definite location of the road, but were never perfected by the offer of proper proof thereon accompanied by tender of the purchase money in payment therefor.

The company contends first, that the act of March 3, 1887 (*supra*), provides for the adjustment of railroad land grants in accordance with the decision of the supreme court, and as such court has never held specifically that an unperfected pre-emption filing, existing at the date of the attachment of rights under a railroad grant, would defeat the

operation of such grant, upon the land so filed for, that there is no authority for the present demand.

While it is true that said act directs the adjustment to be made in accordance with the decisions of the supreme court, yet the second section provides:

That if it shall appear, upon the completion of said adjustment, or sooner, that lands have been *from any cause*, heretofore erroneously certified (or patented) . . . it shall be the duty of the Secretary of the Interior to thereupon demand, etc.

The Secretary of the Interior is, by such legislation, made the judge to determine whether the case, as presented by the records of the land office, warrants making the demand.

Numerous questions are presented every day for determination as to whether some particular tracts passed under a railroad grant, for the determination of which no decision of the supreme court can be found as a guide. New cases are every day coming before that court for decision. Must this Department wait until a similar case is passed upon by the court?

How is the case to arise?

The power to recommend suits for the recovery of lands erroneously patented on account of railroad grants, existed before the passage of said act, and said act in nowise limited the powers of this Department.

Attention might also be called to the provisions of the eighth section of the act of March 3, 1891 (26 Stat., 1095), which provides—

That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act.

The greater part of this time has already run and all contemplated suits must soon be disposed of.

It is further urged by the company, in its answer, that these filings were allowed while the order made by the letter of June 22, 1857, was yet in force, and, as the allegations of antecedent settlement were essential to the admission of the filings, it is necessary to prove that such settlements were in fact made, as alleged, in order to give validity to the filings.

The act making the grant did not authorize a withdrawal of the lands prior to the definite location of the road, and, without questioning the authority to make such withdrawal, it is sufficient to say that said withdrawal gave the company no additional rights under its grant.

The allowance of filings against the order was a matter solely between the United States and the claimant. The objection might be waived by the United States but could not be asserted by the company. Will it be asserted by the company that the Secretary of the Interior could not have revoked the order, the next day, a week, or a month after it had been issued?

The rights under the grant attached upon the definite location of its road and not sooner.

This interdiction expired on October 30, 1857, more than one month before the definite location of the road, and although it was sought to have the period lengthened, the request was denied by departmental letter of November 16, 1857.

Whatever bar therefore existed to the allowance of these filings—if there was any objection to their allowance, which I do not admit—was removed by the expiration of the period before any rights had attached under the grant.

These filings were subsisting claims at the date of the definite location of the road and served to except the land covered thereby from the operation of the grant.

I have, therefore, to direct that you make demand upon the company for the conveyance of these lands as contemplated by the act of March 3, 1887 (*supra*), and at the expiration of the required time report action taken.

The company's answer is herewith returned that it may be forwarded with the record made in the demand.

HUNTSBARGER *v.* EICHMANN.

Motion for review of departmental decision of March 9, 1893, 16 L. D., 270, denied by Secretary Smith April 16, 1894.

TIMBER CULTURE CONTEST—HEIRS—RULE 48 OF PRACTICE.

BIDWELL *v.* BIDWELL'S HEIRS.

A contest against the heirs of a deceased timber culture entryman, on the ground of non-compliance with law, cannot be properly maintained by one of said heirs; and no rights are secured through a contest of such character.

Where a decision of the local officers is contrary to existing laws or regulations the Commissioner may consider the case on its merits and reverse the ruling of said officers, though the appeal does not ask for such action.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (E. M. R.)

This case involves the NW. $\frac{1}{4}$ of Sec. 9, T. 101 N., R. 61 W., Mitchell land district, South Dakota.

The record shows that George S. Bidwell made timber culture entry for the above described tract May 15, 1879.

August 7, 1886, Maude C. Kober made timber culture entry for the land in controversy, the prior entry of Bidwell having been cancelled by relinquishment.

May 28, 1887, Frank A. Bidwell filed an affidavit of contest against the entry of Kober, alleging that the relinquishment of George S. Bid-

well was invalid, as he was of unsound mind at the time of its execution.

March 23, 1888, Mary J. Bidwell, the widow of the deceased entryman, George S. Bidwell, who committed suicide on the 28th day of April, 1887, filed her affidavit of contest, making the same allegations as to the sanity of the relinquisher, and also filed a motion to dismiss the contest of Frank Bidwell, as fraudulent, speculative and collusive.

Upon this second contest filed by Mary J. Bidwell, no action was taken, but by your office letter "H", of August 25, 1889, the case of Frank A. Bidwell v. Maude C. Kober was finally closed, and the entry was cancelled, and that of George S. Bidwell was reinstated, subject to the heirs' compliance with the law.

July 30, 1889, Frank A. Bidwell filed an affidavit of contest against the entry of George S. Bidwell, setting forth that the entryman died on April 28, 1887, and that from August 7, 1885, up to his death the said George S. Bidwell had failed to cultivate the trees upon the land, in accordance with the law, and that since his death his heirs have also failed to cultivate the tract or any part thereof, and further, that at that time there were not five acres of trees, seeds or cuttings upon the land.

The heirs of George S. Bidwell were set out to be Mary J. Bidwell, his widow, Georgiana C. Bidwell, an infant, and the contestant Frank A. Bidwell.

July 22, 1890, the register and receiver rendered their joint opinion, wherein they held the entry for cancellation, and denied to the contestant the preference right of entry.

July 24, 1890, Frank A. Bidwell appealed from that portion of the decision denying him a preference right. There was no appeal by the other parties to the suit.

March 10, 1892, your office decision was rendered, wherein the finding of the local officers was reversed, and the entry was reinstated.

Subsequently, upon a motion for review, setting forth that the decision sought to be reviewed was in error in reversing the local officers, and reinstating the entry for the reason that the case was not before your office on its merits, but only for decision upon the denial to the contestant of a preference right of entry. Your office decision of June 20, 1892, affirmed that of March 10, 1892, and the contestant appealed to the Department.

There are two questions necessary to be passed upon, raised by the appeal. The first being, was the contestant's preference right such a right as could be taken away?

The act under which a contestant has a preference right of entry is that of May 14, 1880, (21 Stat., 140) section two thereof. But whilst that section contains general language, this Department has construed it to be limited in furtherance of equity and of good faith.

In the case of *Vaughn v. Brecheisen* (10 L. D., 585) the syllabus is as follows:

The contestant cannot be heard to complain of the entryman's failure to comply with the law, if such failure is the result of the wrongful act of the contestant.

In *Fletcher v. Gates* (7 L. D., 24) it was held that—

The contestant is estopped from charging non-compliance with the timber culture law, when he, as the agent of the entryman, had undertaken to fulfill the requirements of the law.

In *McAnulty v. Wood* (11 L. D., 177) the syllabus is:

A contestant will not be permitted to take advantage of his own wrong to establish a charge of non-compliance with law, and thus secure a preference right of entry.

And again, in *Wilson v. Vaughn* (16 L. D., 365) it was held that—

A timber culture contestant who, for purposes of cultivation, has control of the land embraced within the entry under contest, will not be permitted to take advantage of his own failure to cultivate, in order to defeat the rights of the entryman.

The cases cited are sufficient to establish the doctrine that this Department has under certain circumstances, denied to the contestant a preference right.

The case at bar presents an heir contesting the entry of an ancestor, alleging that since his death the heirs had failed to cultivate, in accordance with the law. If this allegation were true, and the contestant were allowed a preference right, it would follow that this Department had sanctioned one's taking advantage of his own wrongful act to secure the land in issue at the expense of his co-heirs.

Such a state of facts and conclusions of law would be contrary to the spirit of the holdings of the Department, and in violation of equity.

As an heir of George S. Bidwell, the contestant was equally obligated with Mary J. Bidwell and Georgiana C. Bidwell to see that the law was complied with, and if there was any such failure it was due in part to the laches of Frank A. Bidwell, and it is therefore held that an heir of a timber culture entryman cannot be heard to contest the entry, and acquires no rights by reason of such contest.

The second question raised by the appeal refers to the legality of your office decision in going into the merits of the case and reversing the local officers, when the only appeal taken did not ask for such inspection, and specifically gave the ground of error to be the denial by the register and receiver to the contestant of the usual rights in such cases.

Rule 48 of Practice is as follows:

RULE 48.—In case of a failure to appeal from the decision of the local officers, their decision will be considered final as to the facts in the case, and will be disturbed by the Commission only as follows:

1. Where fraud or gross irregularity is suggested on the face of the papers.
2. Where the decision is contrary to existing laws or regulations.
3. In event of disagreeing decisions by the local officers.
4. Where it is not shown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal.

The opinion of the local officers discloses that they made no finding of facts, but simply recommended the cancellation for non-compliance with the law. The register and receiver, except where a relinquishment is filed, have not the authority to cancel an entry, and can only recommend such a course to the Commissioner of the General Land Office, and as the question of cancellation is addressed primarily to the discretion and judgment of the Commissioner, it must follow, that in order to act intelligently, it became necessary to examine the records.

The second clause of Rule 48 (*supra*) clearly covers the case now under consideration, and an examination of the record leads me to concur in your office decision, and the same is hereby affirmed.

PRACTICE—WITHDRAWAL OF APPEAL.

HILL v. PATZER ET AL.

Where an appeal from the General Land Office is withdrawn by the appellant prior to the transmission of the record to the Department, the Commissioner may dismiss said appeal, and close the case as though no appeal had been taken.

Secretary Smith to the Commissioner of the General Land Office, April 16,
(J. I. H.) 1894. (G. B. G.)

This case is before the Department on an appeal by Hill in the case of George Hill v. Charles Patzer and Thos. J. Smith, Kingfisher, Oklahoma land district, from the decision of your office of October 31, 1893, "dismissing contest against Patzer's homestead entry No. 7500 upon E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lots 1 and 2 of Sec. 7 T. 16 N., R. 8 W., cancelling said entry, allowing Smith to perfect his entry in thirty days of notice, holding his rights superior."

In the letter of transmittal, your office calls attention to the further fact that "This case is forwarded in accordance with ruling in case of Stenoien v. Northern Pacific R. R. Co. (12 L. D., 495)."

It appears that after said Hill's appeal had been accepted by your office, and before the record had been transmitted to the Department, that the said appellant filed in your office a written motion withdrawing his appeal, and dismissing his contest, and the question is presented to the Department as to the propriety of continuing in force a rule of procedure adhered to in Stenoien v. Northern Pacific R. R. Co. *supra*, and cases therein cited.

In that case it was held (syllabus) that—

An appeal accepted by the General Land Office terminates its jurisdiction over the case, and it does not subsequently acquire jurisdiction on the withdrawal of such appeal, in the absence of departmental action thereon.

Whatever rule of jurisdiction may obtain in courts of law, the mixed judicial and administrative functions of the Department are such that these questions may be dealt with, under discretionary powers, having

due regard for the rights of litigants, and the proper protection of governmental interests.

There does not appear to be any good reason why your office should not be allowed to make a final order in such cases, such order being essentially ministerial, and the press of public business under the administration of the public land laws demands the abrogation of the rule that has heretofore obtained.

Hill's appeal herein is hereby dismissed, and in all cases in which an appeal has been accepted, and afterwards a motion shall have been filed by the appellant, withdrawing said appeal before the transmission of the record to the Department, your office is directed to dismiss the appeal, and make such final order in the case as if such appeal had never been accepted.

RAILROAD GRANT—WITHDRAWAL ON GENERAL ROUTE—RELINQUISHMENT.

NORTHERN PACIFIC R. R. CO. *v.* McMAHON.

A relinquishment by the company of lands included in the original withdrawal on general route, and not within the withdrawal on the amended route, should not be applied by the government as against the company in view of the fact that said relinquishment was at the instance of the Department, and that the second withdrawal is not effective under the law.

But where a homesteader, prior to definite location of the road, acts on such relinquishment, and makes an entry of land so relinquished, the company is estopped from claiming the land as against him.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (F. W. C.)

I have considered the case of the Northern Pacific Railroad Company *v.* John W. McMahon, involving the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 11, T. 26 N., R. 6 E., Seattle land district, Washington, on appeal by the company from your office decision of January 13, 1891, holding said tract to be excepted from its grant.

This tract was originally included within the limits of the withdrawal upon the map of general route of the branch line of said road filed August 15, 1873.

During the year 1879, said company filed a map of amended general route of said branch line which was accepted by this Department on June 11, 1879, upon the condition that the company release further claim to all lands included within the limits under the map of 1873, which might fall without the limits adjusted to the location of 1879.

This the company did and all such lands were restored to entry after due publication of notice in November, 1879.

The land in question fell within said restoration.

Upon the definite location of the road, as shown upon the map filed September 3, 1884, this land again fell within the limits of the grant.

Subsequent to 1879 and prior to 1884, to wit, on April 3, 1883, one Geo. W. Bowman filed a pre-emption declaratory statement for this land, alleging settlement March 30th, preceding.

No proof was ever offered under said filing nor has the same ever been canceled from the records of your office.

Your office decision, appealed from, holds that said filing was a subsisting claim, *prima facie* valid at the date of the filing of the map of definite location, and hence served to defeat the grant to said company, and under this view of the matter, homestead entry No. 6345, by John W. McMahon made April 9, 1884, upon which final certificate No. 3852 issued August 12, 1890, is permitted to stand over the company's protest calling for its cancellation.

In the case of said company against Guilford Miller (7 L. D., 100), it was held that there is no authority of law permitting the filing of a map of amended general route, and that any withdrawal made thereon is in violation of law and null and void. This position was re-affirmed in the case of Cole against said company (17 L. D., 8).

It is therefore contended by the company that if there was no authority of law permitting the filing and acceptance of a map of amended general route, its relinquishment, made in consideration of said acceptance and at the instance of the Department, cannot in good faith be applied, and that the original withdrawal of 1873 must be respected.

The withdrawal upon the map of 1873 was a legislative withdrawal, provided for in the 6th section of the act making the grant (July 2, 1864, 13 Stat., 365), and as the company's relinquishment was made at the instance of this Department, in view of a change in the withdrawal for which there was no authority of law, I am of the opinion that as the withdrawal then made cannot be maintained, that the relinquishment under the first withdrawal cannot in good faith be applied as against the company by the United States.

In this case, however, another feature arises, viz., McMahon was permitted to and did make entry of the land before the definite location of the company's road, hence he acted upon the company's relinquishment and was no party to its procurement. It must be held that when allowed the same was in accordance with the rulings and in all respects regular.

McMahon having acted upon the company's relinquishment, whatever view be taken of the same as between the United States and the company, I am of the opinion that as against McMahon the company is estopped from claiming the land, and as he has perfected said entry by making satisfactory proof of compliance with law, that he is entitled to patent for the land.

Your office decision is therefore affirmed.

HOMESTEAD ENTRY—COMMUTATION.

MATTHEW BENSON.

A homestead entry made since the amendment of section 2301 R. S., cannot be commuted without fourteen months residence and cultivation from date of entry, even though settlement was made prior to the passage of the amendatory act.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (P. J. C.)

The land involved in this appeal is Lot 2 and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 8, T. 36 N., R. E., 4th P. M., Wausau, Wisconsin, land district.

The record shows that Matthew Benson made homestead entry of said tract May 8, 1891, alleging settlement December 20, 1890, and on August 12, 1891, made commutation proof before the clerk of the district court of Oneida county. The same was received and approved by the local office August 18 following, and final certificate issued.

When the matter came up for consideration in your office, the proof was rejected by letter of February 11, 1893, for the reason that the entry—

having been made subsequent to the act of March 3, 1891, falls under the requirements of the 6th section thereof whereby parties proposing to commute their homestead entries to cash must make proof of residence on, and cultivation of the land for a period of fourteen months from the date of the entry;

and the claimant was required, without further publication, to furnish supplemental proof of residence and cultivation for fourteen months subsequent to entry.

Claimant appealed from this decision, assigning as error your decision that the act of March 3, 1891 (26 Stat., 1095), should control as to the length of time in which to make commutation proof on a settlement made prior to the passage of that act.

Section 2301, Revised Statutes, reads as follows:

Nothing in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section twenty-two hundred and eighty-nine from paying the minimum price for the quantity of land so entered, at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting pre-emption rights.

This section was amended by section 6 of the act of March 3, 1891, *supra*, as follows:

SEC. 2301. Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of section twenty-two hundred and eighty-nine from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making final proof of settlement and of residence and cultivation for such period of fourteen months, etc.

The question presented is whether Benson's right to commutation arises under the old or the new statute.

There is no explanation in the record as to why the homestead application was not received and filed January 7, 1891, when presented, or why it was held until May 8 following before its allowance of record.

The original homestead application is dated "January—1891." The certificate of the register thereon is dated May 8, 1891, and the receipt of the receiver for the fees is of the same date. The date of the entry is therefore conclusively fixed as May 8.

If any inference is to be drawn from the record, it would be that for some reason sufficient to the local office the application originally presented was rejected, or, at least, held in abeyance, when it was finally accepted on May 8. This presumption is strengthened by the records in your office, which disclose the fact that one Benjamin S. James made homestead entry of the tract originally described in Benson's application, on December 20, 1890, and the entry was canceled on relinquishment May 8, 1891, the day Benson made entry of the land in question. Hence, so far as the record before me discloses, it must be assumed that the local office was right in not accepting Benson's application the day it was presented because the land was segregated by the entry of James, and the application having been properly rejected, he acquired no right by its presentation. (Richard L. Burgess, 18 L. D., 14.)

But it is insisted by counsel that by the final reception of his application Benson's rights relate back to the day of settlement, as provided by section 3, act of May 14, 1880 (21 Stat., 140), and that he should be permitted to make commutation proof under the law as it stood at the date of his settlement. This question has been discussed at some length and decided by the Department in the case of Francis A. Lockwood (16 L. D., 285). In that case it was said:

The only limitation in time within the five year period, placed on the right of commutation originally, is found in the words "on making proof of settlement and cultivation as provided by law, granting pre-emption rights," and under this provision the Department very properly allowed the commuting homesteader credit for residence from the date of his settlement, in view of the enlarged settlement rights conferred by the act of 1880, and the fact that the period of residence required under the pre-emption law was not statutory but a departmental regulation, established to secure an assurance of good faith on the part of the settler.

But section 2301, as amended, contains a specific requirement in the matter of residence that removes the question now at issue from the line of reasoning adopted in the Kathan case. The right of commutation can only be exercised "after the expiration of fourteen calendar months from the date of such entry . . . upon making proof of settlement and residence and cultivation for a period of fourteen months." The terms "so entered" and "such entry" in the section taken and accepted in their ordinary sense, as used in the statutes and employed in the land department, can only mean the recorded claim of the settler made after due application and payment of the requisite fees, and it is from the date of this "entry" that the period of residence must now be computed if "settlement" is not accepted as the equivalent of such entry. . . .

Now, as heretofore, the homestead settler who takes a claim and lives thereon five years is entitled to credit for residence from the date of his settlement, but if he desires to commute he must show a period of fourteen months' residence from the

date of his entry. The language of the statute permits no other conclusion. In framing its provisions it was the evident purpose of Congress to impose such restrictions upon the right of commutation as to insure the establishment of an actual residence on the land, and this purpose is all the more apparent when it is remembered that the same act that amended this action repealed the pre-emption law outright, thus limiting the exercise of the settlement right to the homestead law with its longer period of residence.

It will thus be seen that under the amended law the right of commutation dates from the "entry," and not from the date of "settlement."

The date of entry undeniably being fixed as May 8, the right to commute is governed by the amended law, and fourteen months' residence and cultivation must be required.

Your office judgment is therefore affirmed.

With the files I find an affidavit of Benson, corroborated by two witnesses, dated February 9, 1894, filed in response to your office demand of February 11, 1893, to make supplemental proof of fourteen months' residence and cultivation from date of original entry. Inasmuch as your office has not passed upon this affidavit, it is returned for appropriate action.

Your office seems to have rejected Benson's proof upon the legal question discussed above only. The inference would therefore be that it was otherwise acceptable.

I have examined the proof, and am of the opinion that the answers to the questions as to the residence of the entryman's family on the land are too indefinite to satisfy the requirements of the law. The answers to these questions should be full, clear, and unambiguous, and where the entryman is shown to be a married man, it must appear that his family has resided in good faith on the land. The proof is returned for your further consideration, in the light of the above suggestions.

SUCCESSFUL CONTESTANT—NOTICE OF CANCELLATION.

HARRIS *v.* LEWELLYN.

Notice of cancellation to a successful contestant must affirmatively appear of record to charge him with failure to exercise his preference right within the statutory period, if the absence of such notice is not due to the negligence of the contestant or his attorney.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (E. M. R.)

This case involves the NW. $\frac{1}{4}$ of Sec. 24, T. 121 N., R. 68 W., Aberdeen land district, South Dakota.

The record shows that John T. Lewellyn made homestead entry for the above described tract, which was cancelled on the contest of George Harris on May 27, 1891.

June 1, 1891, the local officers, by registered letter, notified Knowles and Hughes, the attorneys of record for Harris, at Ipswich, South Dakota, of the cancellation of the entry of Lewellyn, and of the preference right of entry of Harris.

June 10, 1891, the defendant, John T. Lewellyn, made homestead entry for the land, under the second section of the act of March 2, 1889, and on June 24, 1891, the letter sent to the above named attorneys, was returned uncalled for.

August 12, 1891, George Harris, the successful contestant made application to enter the land, which was rejected for reason of conflict with the entry of Lewellyn.

Your office, on September 5, 1891, ordered a hearing, to pass upon the merits of the cause thus raised. At the trial the local officers rendered their decision in favor of the entryman, and upon appeal, your office decision of July 30, 1892, sustained the finding below.

The attorneys notified by registered mail, were the attorneys of record in the cause, for the contestant, and no change in the authority granted them by the contestant, appears of record.

There is in evidence the fact that the names of these attorneys, which were entered upon the records in pencil, were erased at the time of the hearing, and the register testifies that this erasure was made by himself, and indicated that the attorneys had moved away, and that it was made in order to prevent the sending of the circulars to such attorneys. He does not remember when he made the erasure, and therefore there is nothing to show whether the notice was sent subsequent, or prior to the erasure. The question at issue is the sufficiency of the service of the notice shown.

In ex-parte John P. Drake (11 L. D., 574), it was held that—

Notice of a decision by mail, whether by registered or unregistered letter, will not bind the party to be served, if such notice fails to reach him; but the failure to thus receive notice can not be set up by one whose own laches has prevented service in the manner prescribed. This rule is specially applicable as against a successful contestant, where the land has been entered by another after the expiration of the thirty days, and without notice of any defect in the service.

But in the case at bar, it does not appear that the failure to receive the notice was the laches of the contestant, or his attorneys; on the contrary, as the erasure had been made upon the records of the attorneys at the local office, it almost raises a presumption that they notified the local officers of their change of address. However that may be, it does not appear affirmatively that the attorneys of the contestant failed to receive the notice through any negligence of theirs, and in the absence of the reception of the notice, and the rule requiring due and proper notice to affirmatively appear, I am led to hold the notice given in the case, insufficient and without effect.

The decision appealed from is therefore reversed, and the contestant Harris will be allowed to make entry for the land involved.

OSAGE ENTRY—SECTION 7, ACT OF MARCH 3, 1891.

WILLIAM R. SISEMORE.

When a claimant for Osage land under the act of May 28, 1880, submits proof of his qualifications to enter, shows due compliance with law, and makes his first payment for the land, his right thereto is a vested interest, subject only to the lien of the government for the unpaid purchase money; and the receipt then issued to him is a "final receipt" that entitles a subsequent purchaser of the land to the benefit of the confirmatory provisions of section 7, act of March 3, 1891, if otherwise within the terms of said section.

The case of the United States v. Bush, 13 L. D., 529 overruled.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (W. M. W.)

On June 18, 1884, William R. Sisemore filed Osage declaratory statement No. 13,233, for the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 12, T. 27 S., R. 13 E., and the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 7, T. 27 S., R. 14 E. (Independence series), Topeka, Kansas.

He made final proof November 20, 1884, and two days thereafter paid the first installment, amounting to \$23.56. The second installment was paid November 20, 1885, and on December 4, 1886, the third and fourth installments were paid and on the same day certificate No. 11,018 was issued.

The receipt for the third and fourth payments and the final certificate were not transmitted with the appeal; careful search fails to reveal them, and the above information was obtained from the tract-books in "Division C" of your office and from the abstracts of cash sales for the Topeka office.

It appears that on February 5, 1885, Special Agent William Y. Drew examined the land, and on April 28 of that year reported that he had made a personal examination of the same, and found improvements of the value of \$50 or \$60, and that claimant never made residence thereon, but lives in the neighborhood; that the entry is said to have been proved up in the interest of one Charles Gidley, whose wife, "it is claimed," purchased the land of Sisemore. The agent recommended that the entry be held for cancellation, and "presumed" the fraud wilful.

Acting on the agent's report, your office, on May 11, 1885, suspended action on the entry—

Subject to a final determination upon a hearing, which you will hold at a time to be fixed after consultation with the special agent, to enable him to appear and present testimony on the part of the government, and at which the entryman will be allowed full opportunity to defend the validity of his claim.

December 21, 1888, your office held the entry for cancellation; but it does not appear from the record before me that any hearing had then been had.

In a letter dated December 4, 1888, the register advised your office that his records failed to show that any action whatever had been taken in pursuance of the order of May 11, 1885, directing the hearing.

On January 14, 1889, Lansing Gidley, transferee, asked for a hearing, which you ordered on the 24th day of that month.

Upon the hearing, Special Agent A. M. Kinney represented the government, and on March 22, 1890, the register and receiver recommended the cancellation of the entry, and by decision of September 11, 1890, your office affirmed that judgment.

Sisemore and his transferees bring this appeal, claiming that the facts developed at the hearing do not justify the judgment appealed from.

The evidence shows that Sisemore sold the land soon after final proof was made to Myra Gidley. No title deed was exhibited, nor does it appear from the testimony how much claimant received for the land, or the date it was sold. But appellant's brief contains a statement that Sisemore "deeded" the land to Myra Gidley, November 20, 1884, and that she afterwards sold it to her son, Lansing Gidley, who has since made lasting and valuable improvements, amounting, at a reasonable estimate, to \$1500."

The only question necessary to consider in determining the case at bar is whether Sisemore's entry is confirmed by section 7 of the act of March 3, 1891 (26 Stat., 1095), which provides:

All entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona fide purchasers or incumbrancers, for a valuable consideration, shall, unless upon investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.

These lands are to be disposed of under the provisions of the act of May 28, 1880 (21 Stat., 143), and in order to determine the character of the sales made under it, and at what times such sales may be said to be "final" in contemplation of section seven of the act of 1891 (*supra*), it appears to be necessary to state at some length the act of 1880 (*supra*), and the departmental construction of it.

In the case of the United States *v.* Harp *et al.* (13 L. D., 58), it was held that an Osage cash entry, is, for all purposes contemplated in section seven of the act of March 3, 1891, (*supra*) a pre-emption entry. The general circulars of January 1, 1889 (page 12), and of February 6, 1892 (page 38), provide that claimants for these lands shall file a declaratory statement within three months from the date of settlement, and make proof and payment within six months from date of filing. Such proof is required to be made after giving notice by publication before the officers authorized to take final proof in pre-emption cases.

Payments for these lands are required to be made in cash at the rate of \$1.25 per acre and may be made by installments, one-fourth to be paid at the date of the purchase, that is, when the proof is made; but the whole amount of the purchase price may be paid at that time at the option of the purchaser, the remainder may be paid in three equal annual installments with interest thereon at the rate of five per cent per annum.

After entry and payment of the first installment of the purchase money have been made, the lands are subject to taxation according to the laws of Kansas, saving to the United States the absolute right to re-sell the land for any part of the unpaid purchase price thereof that may accrue after such entry and first payment.

Section four of the act of May 28, 1880 (*supra*), provides that where default is made in the payment of any installment of the purchase price by the entryman, and the land has been purchased at tax sale, that—

Such tax sale purchaser or his or her legal representatives, may, upon the day fixed for the public sale, and after such default has become final, under the foregoing provisions, pay so much of said purchase-price as may remain unpaid, and shall thereupon receive a patent for the same as though he had made due settlement thereon.

This provision clearly recognizes the sale made to the original purchaser at the time he offers his proof, pays the first installment and makes his entry as the final sale, in all cases where the land may afterwards be sold for taxes under the laws of Kansas, and the entryman makes default in the deferred payment or payments and the tax purchaser pays to the government the amount remaining unpaid on the original purchase price of the land. In such a case the tax purchaser is entitled to a patent for the land in his own name.

On the 26th day of April, 1887, instructions under the act of May 28, 1880, were issued by the Commissioner of the General Land Office, which were approved by the Department (5 L. D., 581), in which it was said:

The Osage Indian trust and diminished reserve lands are subject to sale to parties having the qualifications of pre-emptors on the public lands.

Claimants are required to file a declaratory statement within three months from date of settlement, and to make proof and payment within six months from date of filing.

The proof must be made after notice by publication, before the officers authorized to take proof in pre-emption cases, and must show that the claimant is a qualified pre-emptor and an actual settler on the land at the date of application to enter. Six months continuous residence next preceding date of proof, is not an essential requirement, but it is essential that the settlement be shown to be actual and *bona fide*.

When the last and final payment was made, the right of forfeiture was extinguished and ceased to have any existence in fact or law, for the entryman had done all that the law, under which the entry was

made, required him to do in order to complete his right to a patent for the land.

This right accrued to him by virtue of his *original* entry, and the first proof and payment made at the time such entry was made. The receipt issued upon said proof, payment and entry, was the *final receipt* upon which his right to a patent depended, and on which the patent would be issued.

In this class of cases the deferred payments are in the nature of a vendor's lien upon real estate, which attaches upon the sale of real estate, but in no way affects the title after such lien is extinguished; the title passes by the sale and the land itself is charged with a lien for the purchase money only, so long as some part of it remains unpaid.

These instructions clearly recognize the first proof required to be made under an Osage entry, as the *final proof* under such an entry. It was accordingly held by the Department in *Rogers v. Lukens* (6 L. D., 111), that a failure to submit final proof within six months after Osage a filing, as required by the regulations of the land department, renders the claim thereunder subject to any valid intervening right. The *Rogers* case was followed by the Department in *Reed v. Buffington* (7 L. D., 154); *Elliott v. Ryan* (id., 322); *Baker v. Hurst* (id., 457). These cases were overruled by the Department in *Epley v. Trick* (8 L. D., 110), which was decided by Secretary Vilas on the 22d day of January, 1889. I am unable to find any reported case wherein the Department followed *Epley v. Trick*, but in the case of *Hessong v. Burgan*, decided by Secretary Noble on the 16th day of September, 1889 (9 L. D., 353), *Epley v. Trick* was expressly overruled and the doctrine laid down in *Rogers v. Lukens* and cases following it, was re-affirmed. In said case it was held that a settler under the act of May 28, 1880, acquires no vested right against the United States until he has made final proof and paid, or tendered, the required purchase money. It follows that when a settler has done these things, he then has a vested right against the government in that he is then entitled to a patent for the land covered by his entry.

In *United States v. Woodbury et al.* (5 L. D., 303) it was held that the statutory oath required of a pre-emptor is not applicable to an entry under the act of May 28, 1880, and that by said act the only condition pre-requisite to an entry of these lands is that the purchaser shall be an actual settler with the qualifications of a pre-emptor.

In *United States v. Johnson et al.* (5 L. D., 442), it was held that—

Purchasers after entry and before patent, take only an equity and are charged with notice of all defects in their title.

In *Grigsby v. Smith* (9 L. D., 98), the *Woodbury* case was followed and it was distinctly ruled that—

The purchaser of such land after having complied with the law and received his final certificate, may lawfully remove from said land, or sell and convey it absolutely.

The Woodbury case was cited and approved by the United States circuit court for the district of Kansas in the case of the United States *v. Edwards et al.* (33 Federal Rep., 104).

In *Carroll v. Safford* (3 How., 441), the supreme court of the United States held that when the purchaser of land from the United States has paid for it, and received final certificate, it is taxable property, according to the statutes of the State wherein the land is located before a patent is issued. This same general doctrine has been frequently announced by the supreme court. *Railway Co. v. Prescott* (16 Wall., 603); *Railway Co. v. McShane* (22 Wall., 444); *Northern Pac. R. R. Co. v. Traill County* (115 U. S., 600); and *Railway Co. v. Price Co.* (133 U. S., 496).

The act of May 28, 1880, makes these Osage lands, after sale—which is made when the final proof is accepted and first payment of the purchase money is paid—subject to taxation under the laws of Kansas, the State in which these lands are located. This, of itself, goes to show that congress intended that such entry was to be the final entry and that the final certificate should issue thereon. The right of the entryman to a patent accrues to him upon making the first proof and payment under his original entry; the receipt or certificate issued to him thereunder should be and is in fact his final receipt; thereafter he has the undoubted right to sell and transfer the land, the right to which is charged with a vendor's lien in favor of the government for any deferred unpaid purchase money due on the land. There is but one entry of these lands and that is the entry made when the final (first) proof is offered, payment made and accepted. Such entry gives to the entryman a vested right subject only to the lien of the government for any unpaid purchase money for the land covered by it. Whenever the whole amount of purchase money is paid, whether by the entryman, his transferee, tax-purchaser, or other person, then the right of the entryman to a patent attaches; and by relation it relates back to, and takes effect from, the date of the original entry. The forfeiture provided for in the act of May 28, 1880, is simply a mode of enforcing the collection of the unpaid purchase money. Under it the land is sold as the land of the entryman, and the patent intended for him is issued to the purchaser at such sale, and in case there is no sale at the public offering of such forfeited lands, then they become subject to cash entry by the terms of the law without any further action.

In this case land was entered under the installment provisions of the act of 1880 and the last and final payment was made under said entry. The right of forfeiture of this entry existed prior to the date of the act of March 3, 1891, for any illegality that would invalidate the entry, such as the qualification of the entryman or want of settlement, but no right of forfeiture existed for unpaid purchase price of the land involved.

For these reasons I must hold that the entry in this case is confirmed

under section seven of the act of March 3, 1891; the judgment appealed from is reversed and the papers in the case are herewith returned with the direction that your office dispose of it under the instructions issued May 8, 1891, to chiefs of divisions (12 L. D., 450).

The case of the *United States v. Bush*, being in conflict with the views herein expressed, is hereby overruled.

SUCCESSFUL CONTESTANT—SETTLEMENT RIGHTS.

MATTHEWS v. BARBAROVIE.

The entry of a successful contestant allowed during the existence of an intervening adverse entry of the same land is illegal, and he acquires thereby no additional rights to the land.

The right of a contestant is personal, and the devisee of a contestant takes no right in the contest.

The act of July 26, 1892, conferring upon the heirs of a contestant the right to proceed with the contest, affords no relief where the contestant dies prior to the passage of said act.

Settlement rights are not acquired under the public land laws by the devise of possessory rights and improvements.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (G. B. G.)

The land in controversy is the SE. $\frac{1}{4}$ of Sec. 9, T. 36 N., R. 1 E., Seattle land district, Washington.

On October 13, 1879, Patrick Foy made homestead entry for the tract. November 8, 1886, John L. Matthews contested said entry, alleging abandonment by the entryman for five years before the entry.

March 30, 1887, after hearing duly and regularly had, the local officers rendered an opinion, recommending the cancellation of the entry.

May 10, 1887, the contest papers and affidavit were transmitted to your office, and on July 20, 1887, Foy's entry was cancelled, but it seems that said cancellation was had "by reason of the expiration of the life-time of the entry," without regard to said contest.

The register reported that on such cancellation Matthews was notified by personal service on his attorney, John F. Gowey.

December 6, 1887, the defendant, John Barbarovie, made homestead entry for the tract.

On January 5, 1888, John L. Matthews made a statement that he had not received official notification of the cancellation of Foy's entry until December, 1887, and he was allowed to make homestead entry for the same tract.

A further history of the case, pertinent to a correct understanding of the issues involved, is set out in the opinion appealed from, and is as follows:

January 26, 1888, Foy's entry was cancelled by letter "H", responsive to the contest of Matthews, of which he had notice, and before thirty days thereafter, he

again applied to enter, and accompanied his application with his own and other affidavits, showing that he had purchased improvements of one Hughes, (who was a squatter on the land), had made some \$80 or \$90 worth of improvements, and had lived on the land continuously since 1886, that during a temporary absence on November and December, 1887, Barbarovie had taken possession, and made entry thereof, and refused to allow him to come on the land; that he then wrote to your office, and in December, 1887, for the first time learned of the cancellation of July 20, 1887, and asked that the entry of Barbarovie be cancelled, or a hearing ordered to determine their respective rights, which was transmitted to this office with your letter of March 19, 1888.

By letter "H", of July 28, 1888, the decision of January 26, 1888, recancelling the entry of Foy, was held to have been an error, the fact that it had been cancelled by letter "C", of July 20, 1887, having been overlooked, and amended the same "so as to show the closing of the case of Matthews v. Foy in favor of Matthews, and the allowance to him of the preference right of entering the land, by virtue of his contest proceedings", and held the entry of Barbarovie for cancellation, because of conflict with the entry of Matthews, made January 5, 1888.

From this decision Barbarovie appealed to the Hon. Secretary of the Interior, claiming that the contest of Matthews was improperly allowed, because, at the time he began the contest, the entry of Foy had expired by limitation, and that if it was properly allowed, Matthews lost his preference right thereunder, by failing to exercise the same within thirty days from notice of cancellation by letter "C", of July 20, 1887, and asked that his entry be allowed to stand, or "In the event that it is deemed necessary . . . that a hearing be ordered, where testimony in relation to the same may be given."

The Honorable Secretary of the Interior rendered his decision March 23, 1891, wherein he held, in effect, that the contest was properly allowed, notwithstanding the entry of Foy had expired by limitation, the same being intact on the records; that Matthews could not make his entry until he had removed the entry of Foy, which he could only do by a contest, and that his contest was initiated before the government had taken any steps to cancel it. That Matthews was therefore entitled to his preference right when the entry was cancelled July 20, 1887, notwithstanding the same was done independent of the contest; that the testimony he submitted fully sustained the allegations of his contest, and had secured a judgment of the local officers, recommending a cancellation of the entry, all of which proceedings had been before the Commissioner for two months before he made said cancellation; that whether he was duly notified through his attorney, does not satisfactorily appear from the report of the register, who says: "Upon cancellation of said entry by your letter 'C,' of July 20, 1887, said Matthews, contestant, was notified thereof, notice being served personally upon John F. Govey, his attorney"; that it does not appear when such notice was served, there being no evidence of service; that if he was notified, either personally, or through his attorney, more than thirty days before he made his entry of January 5, 1888, the entry was improperly allowed, because the entry of Barbarovie was then of record, and was entitled to priority by reason of Matthews having failed to avail himself of his preference right within the time allowed by law; that it would be error to cancel the entry of Barbarovie without notice, and giving him an opportunity to be heard in defense; that by the report of the register, it appears that Barbarovie did not file his appeal in time, having had notice of the decision July 5, 1889, and filed his appeal October 2, 1889; that the equities appear to be with Matthews, but he is unable to decide the case on the incoherent and unintelligible record before him, and directed a hearing on the matters pointed out, that a decision may be held in conformity to the rights of the parties.

With letter "H", of April 3, 1891, a copy of said decision was transmitted to your office, and it appears that pursuant thereto, a hearing was ordered to be had at your office June 16, 1891, when it was made to appear that John L. Matthews had deceased,

and had devised all his interest in his said entry, to his father, James F. Matthews, who was substituted as the party plaintiff in this case.

The parties appeared in person and by attorney, and the testimony was submitted.

October 28, 1891, you rendered your decision as follows, to wit: "There is no evidence to show that Gowey was employed as Matthews' attorney. He certainly never filed his appearance as attorney in the case. There is no evidence that the register notified any of the parties to the contest, of the decision of the Commissioner of the General Land Office, of July 20, 1887. Matthews was entitled to such notice, and failing to receive it, can not be deprived of preference right of entry. We are of the opinion, therefore, that the homestead entry No. 9363, of John Barbarovie, should be held subject to the preference right of entry of John L. Matthews.

On appeal, your office affirmed the decision of the register and receiver, held Barbarovie's entry for cancellation, and the entry of Matthews intact, subject to future compliance with law. Further appeal brings the case to the Department. The errors assigned are numerous, but substantially, the questions raised by the appeal are:

1st. Are the rights of a contestant preserved when the entry attacked by the contest is cancelled on evidence other than that furnished by the contestant?

2d. Is an entry made by a stranger to the record, pending the existence of a preference right in another by virtue of a successful contest, such a segregation of the land as would make a subsequent entry of the same land void, the first entry remaining intact of record.

3d. Are such rights acquired by contest, as are the subject of assignment or inheritance?

The first question is *res judicata*, having been decided in the affirmative by departmental opinion rendered March 23, 1891, (Matthews *v.* Barbarovie, 12 L. D., 285), the parties in interest being essentially the same as in the case at bar, the question will not be reviewed.

It follows, therefore, that for the purposes of this opinion, the contestant, John L. Matthews, did have a preference right of entry of the land in controversy, notwithstanding the fact that the entry of Foy was cancelled independent of his contest.

On the second question, it does not appear that Matthews received such notice as the law requires, or any notice of the cancellation of Foy's entry, and no effort was made by him to exercise his preference right of entry until Barbarovie had been allowed to make entry for the land. It is clear that under such circumstances, his preference right of entry did not abate, and that the entry of Barbarovie could only have been legally received, subject to Matthews' preference right of entry, but it is equally clear that an entry so made is not void, but voidable only, the integrity of the same resting on the possible exercise of a preference right in another. A void entry is not a segregation of the land covered by it, but a voidable entry while of record operates as a reservation of the land, it being *prima facie* valid. See *St. Paul, M. and M. Ry. Co. v. Forseth* (3 L. D., 446); *Buttery v. Sprout* (2 L. D., 293-294) and cases cited.

It follows, therefore, that the homestead entry of the contestant, allowed January 5, 1888, was illegal, and conferred no additional right.

This being true, the third question follows, did the contestant have such a right by virtue of his contest, as the plaintiff James F. Matthews could take by devise? The Department has uniformly held that the right of a contestant is personal, and can not be transferred to another. *Welch v. Duncan, et al.* (7 L. D., 186); *Kellem v. Ludlow* (10 L. D., 560) and *Tillinghast v. Van Houten* (15 L. D., 394).

The act of July 26, 1892, (27 Stat., 270) secures to the heirs of a contestant the same rights as the decedent would have had under the law if living, but said act is not retroactive, and affords no relief in this case, the contestant herein having died prior to the passage of the act.

There is one other question not mooted in the judgment appealed from, but suggested by a statement of fact therein.

It is alleged in the contest affidavit, as has been seen, that Matthews was invested with certain settlement rights, and it may be urged that he was thereby clothed with an equitable right to the land, in addition to the legal one acquired by his successful contest.

Without going into the truth of this contention as a matter of fact, the law affords no relief, accepting it as true. Were John L. Matthews living, he would have sufficient protection under the law and equities of the case, but he could no more devise his settlement rights than he could devise his contest rights. It has been uniformly held that settlement rights cannot be acquired by purchasing the possessory rights of another. See *Stone v. Cowles* (on review) (14 L. D., 90); *Leonard v. Northern Pacific R. R. Co.* (15 L. D., 69) and cases cited.

And *a fortiori* it is now held that settlement rights are not acquired under the public land laws by the devise of possessory rights and improvements.

The devisee, James F. Matthews, therefore took nothing under the will of John L. Matthews, and the entry of Barbarovie will be allowed to stand intact.

The judgment appealed from is reversed, and the case remanded for proceedings consistent with this opinion.

TIMBER LAND APPLICATION—PUBLICATION OF NOTICE.

SANDERS v. PARKER.

The failure of a timber land applicant to publish the notice of his intention to purchase a tract, as posted in the local office, leaves the land embraced in his application subject to intervening adverse claims.

Secretary Smith to the Commissioner of the General Land Office, April 16,
(J. I. H.) 1894. (A. E.)

The record of this cause shows that on May 18, 1889, Fred E. Parker filed an affidavit, in the local office at Seattle, Washington, to the effect that he desired to purchase the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 8, T p. 35 N.,
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R. 4 E., under the provisions of the timber and stone act of June 3, 1878 (20 Stat., 89), and that the same was chiefly valuable for timber.

In pursuance of the provisions of the act, the register filled in the notice prepared for such occasions and posted the same in the local office, for a period of sixty days, beginning on May 18, 1889. This notice gave January 23, 1891, as the time for taking proof, and gave the names of four witnesses. Parker did not publish a copy of this notice in a newspaper, as required by the law.

On October 19, 1889, Jeff D. Sanders filed declaratory statement of his intention to pre-empt said land, alleging settlement on the same.

On April 9, 1890, Sanders filed a corroborated affidavit, in which he stated that the land was valuable for agriculture, and not chiefly valuable for timber.

On April 21, 1890, Parker filed a sworn petition stating that the date of making proof had been fixed without his consent, and asking that an earlier day be set. In response to this, the register fixed November 3, 1890, and posted a notice to that effect for sixty days in the local office, beginning April 21, while Parker published a copy of the same in a newspaper for sixty days, beginning on May 5, 1890. The witnesses named in this notice were all different from those in the notice posted by the register on May 18, 1889, eleven months before.

On August 26, 1890, at the request of Sanders, the local office posted a notice of his intention to offer proof on October 25, 1890. On September 10, 1890, Sanders began the publication of a notice that he would make pre-emption proof on October 25, 1890.

On October 8, 1890, Parker filed a protest against the allowance of Sanders's proof, under his pre-emption claim, alleging that the land was not suitable for farm crops in paying quantities.

On October 25, 1890, Sanders offered his proof of settlement and residence. The record does not show that Parker appeared.

On November 3, 1890, Parker offered his proof as to the land being chiefly valuable for timber. In this he and his witnesses admitted the existence of the cabins and clearings of Sanders on the land.

On November 28, 1890, a notice was issued by the local office, directed to Sanders, notifying him of the complaint of Parker, the charges thereof, and that a hearing would be held on January 21, 1891.

At the hearing Sanders was made contestant, and the burden placed on him to show the land was not chiefly valuable for timber. This was an error. If the hearing were properly held, the burden was on Parker, who not only desired to purchase the land as timber, but made the complaint from which the contest arose.

After this hearing—that is to say, on April 29, 1891—the local officers decided “that the evidence shows the land to be agricultural in character, not properly subject to entry under the act of June 3, 1878, and that the timber land application of F. E. Parker should be cancelled.”

From this Parker appealed, and, on September 26, 1892, your office affirmed the local office, because Parker, "by the long and plainly unnecessary delay in seeking to perfect his entry has forfeited all right acquired to the land by virtue of his original application." From this Parker appeals to this Department.

Parker bases the right to purchase the land in controversy upon the provisions of the act of June 3, 1878.

The act provides that the person desiring to take advantage of its provisions shall file a duplicate statement in the local office containing a description of the land, and stating, among other things, that it is unfit for cultivation and chiefly valuable for timber or stone; that upon the filing of this statement,

the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and, after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application, prepared by the register as aforesaid, was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements other than those excepted" (i. e., water rights or rights to ditches and reservoirs), "either mining or agricultural," etc.

The evident intention of Congress in providing for the publication of this notice was to notify possible settlers under the pre-emption law not to settle and make improvements on the land, which the posting of a notice in the local office would not do, and such public notice in the nearest newspaper to the land would be a reasonable and sufficient notification to preserve to the applicant a preference right.

That this preference right should not be retained for an unreasonably long period, the law required that proof should be made at the end of the sixty days, and, under the last sentence of the fifth section of the act, giving the general land office authority to make the act effective by regulations, the registers of the local offices were instructed to cancel all applications where the provisions of the act had not been complied with within ninety days after application.

Owing to the fact that more applications were filed in the Seattle office by virtue of this act than the official could take proof on within ninety days from the date of filing, a circular was issued on September 5, 1889 (9 L. D., 384), which contained the following:

The registers will hereafter fix the date for making proof and payment in the notices furnished by them, in this class of cases, at a reasonable time, after due publication, having due regard to the exigencies of business at their respective offices.

In the case under consideration, Parker did not comply with the law in a very important particular, i. e., he did not publish a copy of the notice posted by the register. His neglect to do so was a virtual abandonment of his intention to buy the land. When Sanders filed his

declaratory statement, five months after Parker filed his application to purchase, no notice had been yet published, and no notice was published until nearly seven months after, or twelve months after Parker first filed his application, and then the notice published was different as to date and witnesses from that first posted. This failure to publish the first notice was not due to any neglect of the local office. The register performed the part required by him, by posting the notice on receipt of the application. The neglect of Parker warranted Sanders in making his improvements, and lost to Parker any preference right which he may have initiated by reason of his application.

The departmental circular of September 5, 1889, allowing the Seattle officers, owing to the great number of applications, to extend the time of taking proof in these cases, did not extend the time for publishing the notice, and such an extension is in violation of the act. The intention of the act is that the posting of the notice and the publication of the notice must be as nearly simultaneous as possible, and begun immediately after the filing of the application; by this alone can a preference right attach. The taking of proof and payment may be made, in the words of the circular of September 5, 1889, "at a reasonable time after due publication, having due regard to the exigencies of business."

In view of what has been said, it is not necessary to consider the character of the land, as the pre-emption law did not exclude a settlement on land containing timber.

Your office decision is therefore affirmed.

PRACTICE—APPEAL—CERTIORARI—ATTORNEY.

KING ET AL. v. CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

Certiorari will not be granted where the right of appeal is lost through the negligence of the applicant's attorney.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (E. M. R.)

This case involves lots 3 and 4 and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 10, and lots 1 and 9 of Sec. 15, T. 104 N., R. 71 W., Chamberlain land district, South Dakota.

The record shows that under date of December 12, 1893, your office decision dismissed the appeal of Henry J. King from your office decision of August 18, 1893, in the above entitled case. King received notice of the rejection of said appeal on August 25, 1893; the time for appeal from that decision expired on November 3, 1893; his appeal was not perfected until November 7, 1893, and from the rejection of his right of appeal King comes before the Department and in his affidavit for the issuance of a writ of certiorari to you, submits the following facts:

STATE OF SOUTH DAKOTA, *Lyman County*, ss:

Henry J. King, being duly sworn, says he is the appellant above-named, that he employed W. A. Porter to act as his attorney in said cause, and to take an appeal in

this case to the Secretary of the Interior, that affiant several times saw said Porter in regard to such appeal and urged him to get the same completed, that said Porter stated to affiant that he would have it taken in plenty of time. That about the 16th of Oct. 1893, said Porter removed from Chamberlain, S. D., to the State of New York, and on that day he told me that he had made arrangements with Edwin Greene, an attorney of Chamberlain, to complete the appeal. I next day saw Mr. Greene and he told me that he had never been told anything about it by Porter. I afterwards learned that Porter had taken all the papers in the case with him to New York, and I had no copy of the decision of the Commissioner of the General Land Office, and no other papers from which I could learn the standing of the case, or how long I had in which to complete my appeal.

That affiant had to obtain a copy of the Hon. Commissioner's decision from the local land office at Chamberlain to ascertain said facts.

I then employed G. H. King of Oacoma, S. D., as my attorney to complete said appeal, and said claimant and appellee had no attorney of record on whom notice of appeal could be served, and by the time the notice could be served on claimant's officers at Chamberlain, S. D., the time for serving said copy of appeal had expired.

There is also contained in the record King's formal appeal from your office decision.

The only question contained in the case is the sufficiency of the showing made; in other words, was the negligence of the applicant's attorney, under the circumstances, such a negligence as debars the plaintiff-appellant from the right to be heard here?

In the case of *Ream v. Larson* (14 L. D., 176) it was held: "Certiorari will not be granted where the right of appeal is lost through the negligence of the appellant's attorney;" and in *Nichols v. Gillette* (12 L. D., 388), it was said: "Notice of a decision served upon the attorney is notice to the client and certiorari will not be granted where the right of appeal is lost through the attorney's negligence". In this case, as the one at bar, the attorney had changed his residence; and in this case the attorney had even failed to notify his client that judgment had been rendered against him and yet the application for the writ was rejected.

In *ex-parte Ariel C. Harris* (6 L. D., 122), the syllabus is: "The writ of certiorari will not be granted where the right of appeal is lost through failure to file the same in time.

Exceptions to such general rule will not be made though it appear that the case is *ex-parte* and the right of appeal was lost through the negligence of the attorney.

The cases cited are sufficient to show that the application to is not based upon legal and sufficient grounds. The relations of attorney and client are so close that, for the purposes of appeal and the service of notice, the negligence of the one must, in law, be held to be the negligence of the other. There must be a period of time at which the right of appeal is lost, and it is better that individual hardship may be done in a particular case rather than that the law should become uncertain. Public policy demands it and such has been the ruling of this Department.

The application for the writ is therefore denied.

RAILROAD GRANT—RES JUDICATA—SETTLEMENT CLAIM.

MAXWELL *v.* CENTRAL PACIFIC R. R. CO.

A final decision of the General Land Office, holding a tract not excepted from a railroad grant on account of a specified settlement claim, will not preclude subsequent consideration of the effect of said claim as against the grant, on the suit of another applicant for the land.

The existence of a claim, based on occupancy and cultivation, at date of definite location, excepts the land covered thereby from the operation of the grant.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (G. B. G.)

The land involved herein is the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 9, T. 14 N., R. 6 E., Marysville land district, California.

From your office opinion of August 18, 1892, it appears that these tracts of land are within the limits of the grant to the Central Pacific Railroad Company, under the acts of Congress approved July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), the right of "which attached to its granted lands in this district at the date of the latter granting act, the road having been definitely located March 26, 1864."

It further appears from your said office opinion that the withdrawal for the benefit of the grant became effective in the Marysville land district, California, October 3, 1864, and that the township plat was filed September 18, 1868.

It appears further that one Wm. G. Pettigrew, on December 17, 1868, filed his declaratory statement for the land in question, alleging settlement thereon November 1, 1857, and that one Ezra B. Wright, on May 7, 1884, filed his declaratory statement for the same land, alleging settlement thereon November, 1867.

It appears that these claims were never perfected, and that on March 19, 1884, one Felix G. Hendrix filed his declaratory statement for said land, and after due publication he submitted pre-emption proof in support thereof, which proof The Central Pacific Railroad Company contested, and in the testimony submitted on said contest, the local officers found that the land had inured to the company under its grant, and for that reason rejected Hendrix's claim thereto.

From this decision no appeal was taken, and by your office letter of February 3, 1887, to the local officers of said land district, "it was affirmed and declared final; and Hendrix's filing was cancelled."

With letter of October 20, 1891, the local officers transmitted to your office a *prima facie* showing made by the contestant Maxwell, that said land was excepted from the grant to said company, and thereupon your office directed the hearing herein, upon which hearing the register and receiver found in favor of the railroad company, and on appeal your office reversed the finding of the local officers.

The company has appealed to the Department, on the following assignment of errors:

1st. In finding the case was not *res judicata*, it appearing that the same claim of Pettigrew was set up in this case as defeating the grant, as was asserted in the case of Hendrix, but which both the register and receiver and the Commissioner found to be without foundation in fact, and it was error to hold that this case was ruled by the decision in *Griffin v. Central Pacific R. R. Co.*

2d. In finding that Pettigrew was "a qualified settler."

3d. In finding that Pettigrew "Continued to live upon, cultivate and claim the land until after the definite location of the railroad."

4th. In not dismissing Maxwell's contest, there being no authority of law for proving Pettigrew had, or asserted at any time, a pre-emption claim to the land.

The question of contestant's right to this land, depends primarily on the fact as to whether from any cause said land did not inure to the railroad company under its grant, and under the record in the case at bar, this fact is to be determined by the *bona fides* of Pettigrew's settlement at the time the grant went into effect.

As has been seen, this identical fact was determined in favor of the railroad company by your office letter of February 3, 1887, in the contest case of *The Central Pacific Railroad Company v. Hendrix*.

Without going into the principles of *res judicata*, as applied in courts of law, it may be said that the uniform trend of departmental decisions in analogous cases, is to the effect that a prior adjudication as to facts of settlement, is essentially a judgment *in personam*, and to bring such a judgment within the rule of *res judicata*, there must be an identity of parties. See *Henry T. Wells* (3 L. D., 196, 199); *Southern Minn. Ry. Extension Co. v. Gallipean* (3 L. D., 166) and *Merritt v. Philp* (16 L. D., 404); *Griffin v. Central Pac. R. R. Co.* (5 L. D., 12).

The testimony shows that Pettigrew enclosed the land in dispute, in 1860, occupied and claimed the same, and that he continued to live upon, cultivate and claim the land until after the definite location of the railroad, and the withdrawal made for the benefit thereof.

It follows, therefore, that said land did not inure to the railroad company under its grant, and for that reason it is subject to entry under the public land laws.

The decision appealed from is approved and affirmed.

APPLICATION TO CONTEST—FILING MARKS.

WOODS ET AL. *v.* BRADLEY.

A changed date (from an earlier to a later), in a stamped filing mark, on an application to contest an entry, may be accepted as establishing the actual priority of such application as against another, bearing a stamped filing mark of the later date, though the latter application bears the lower number.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 16, 1894. (E. M. R.)

This case involves lots 1 and 2 and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 3, T. 12 N., R. 2 W., Guthrie City land district, Oklahoma Territory.

The record shows that on April 29, 1889, J. H. Bradley made homestead entry for the above described tract.

On August 2, 1889, J. H. Woods and W. W. Asher both filed affidavit of contest alleging, that Bradley was disqualified to make entry in the Territory, inasmuch as he had entered Oklahoma prior to 12 o'clock, noon, of April 22, 1889.

The contest of Woods is No. 637 and that of Asher No. 639.

March 17, 1891, subsequent to the transfer of the record from the office at Guthrie to Oklahoma City, Asher filed an amended affidavit in the latter office, by which Woods was made a party defendant, alleging, that although the contest of Woods was given the prior number, the contests were in fact received by the same mail, and further charged that the contest of Woods was made for speculative purposes.

The case was finally closed before the local officers on August 18, 1891, who in their decision stated that the evidence introduced by Asher established the allegation as to the disqualification of Bradley, but did not sustain the charge of speculation against Woods, and that the agreed statement of facts introduced and submitted by Woods and Bradley established the fact that Bradley was within the Territory in violation of the acts of Congress and the President's proclamation prior to 12 o'clock, noon, on April 22, 1889.

They further stated:

We are not able to determine from the testimony which of the two affidavits of contest was presented first for filing at Guthrie land office, but we find that the contest of Woods is first upon the contest records and bears a number which would indicate that it was presented and filed prior to the contest of Asher. In the absence of proof to the contrary, we are bound by the record and must hold the contest of Woods to be the prior contest. The contest of Asher having been placed of record after that of Woods, the burden was upon him to show by a preponderance of evidence either that the affidavits were presented simultaneously, or that his was presented first. This he has failed to do.

They therefore recommended that the entry of Bradley be canceled; that the contest of Asher be dismissed and that Woods be awarded the preference right of entry.

Upon appeal, your office decision of October 7, 1892, was rendered, wherein it was held that Bradley was disqualified; that the charge that Woods had initiated contest for speculative purposes was not sustained by the evidence, and it was further held that the application and contest of Woods and of Asher were filed simultaneously and it was directed that the land should be awarded to the highest bidder.

Upon further appeal the case is now before the Department for final adjudication.

July 5, 1893, Jas. H. Bradley filed his relinquishment of his entry leaving for determination here only the question of the rights of the two contestants, which brings up the question of fact as to which application was filed first.

It will be seen from what has heretofore been stated, that the register and receiver found that the application of Woods was filed first; upon the question being before the Commissioner he held that they were filed simultaneously.

An examination of the record prevents me from concurring in either of these conclusions. The evidence shows that one Wm. Monroe, who carried Woods' affidavit of contest to town, states that he did so on the second of August on the morning train. He makes the following statement of what took place after getting there:

I went over to the land office; handed in this paper; asked to see the records of the tract of land that I was about to contest; saw it and then filed my own contest; I went from the land office to the train direct; no delay.

W. W. Asher, one of the contestants, stated that his contest was made out on August first and mailed on that day between the hours of one and two o'clock; that the letter containing it

was mailed at the old post office on the east end of Main (street) on August the first, between one and two in Oklahoma City. Well, I knew that this morning train, this 8:42 train was the only regular mail train at that time, and I asked Mr. Beidler if that would go off that evening. Well, there was but one train; that was about 8:43 in the morning; the other passenger train was 10:47 about in the evening. The postmaster said that the 10:47 carried mail also.

The evidence of one Howard sustains Asher's statement that the letter containing the contest affidavit was mailed the same day it was drawn up and between one and two o'clock of that day. Leonard, another witness,—a mail carrier—testifies that on August 2, 1889, there was only one mail train from the south which arrived at Guthrie at 10:20 in the forenoon; he states that it took generally an hour to distribute and deliver the mail and that he was not aware that there was any mail pouch coming in from the south on the night train.

From the evidence as thus stated, there would seem to be much difficulty in determining which application was first filed; indeed, it would appear from the statements of Leonard and Monroe that, as a matter of fact, the application of Woods was received first at the land office, but there is another view to take of the case which leaves but one conclusion to be arrived at and that is that despite the evidence as stated, Asher's and not Woods' was the first application on file in the local land office. In other words, either the application of Asher was received on August first, or was the first one on the morning of August 2.

The applications have stamped upon their back the following:

No.
RECEIVED
for filing

AT GUTHRIE LAND OFFICE,
Ind. Ter.

On the application of Woods it appears as follows:

No.
RECEIVED
for filing
Aug. 2, 1889,

AT GUTHRIE LAND OFFICE,
Ind. Ter.

At the top of the paper is endorsed its filing number, No. 637.

Upon that of Asher, at the head of the paper appears its filing number, No. 639, and then the following:

No....
RECEIVED
for filing
Aug. 1, 1889,
AT GUTHRIE LAND OFFICE,
Ind. Ter.

And above the stamp is written in ink the figure 2 with the letter "d" added at the top, making it appear now of record as follows:

No....
RECEIVED
for filing
Aug. 2^d, 1889,
AT GUTHRIE LAND OFFICE,
Ind. Ter.

This being the state of the record what conclusion is to be drawn from it? Either that as a matter of fact the contest affidavit of Asher was received and filed on August 1, which is improbable in view of the testimony hereinbefore stated, or that it was received and filed first—or at least ahead of the application of Woods on August 2. There can be no escape from this conclusion in considering the matters thus appearing of record, for the reason that at the time Asher's application was filed, the stamp had not been changed from its condition of the day before and it had been changed when Woods' application was filed. The only way in which Woods' application could have been filed first on that day is that the officers changed the stamp that morning to the 2d, stamped Woods' application, then changed it back to the 1st—which is an absurdity—and stamped Asher's application.

In reference to the filing number given the papers, an easy and probably the true explanation of the reason why Woods' application bears the prior number, consists in the fact that the docket clerk in taking the cases up did so in their inverse order.

Wm. Monroe, it is well to state, who testified that there was no delay by him from the time that he arrived in Guthrie to his appearing at the local land office, says also that he arrived at Guthrie some time between the hours of nine and ten in the morning, nearer to nine than to ten, when, as a matter of fact, the testimony of Leonard indicates that the train did not arrive at Guthrie until 10:20. While this fact does not impeach in any degree the veracity of Monroe, it indicates that he has no definite remembrance of the hour he arrived at the office that morning.

My conclusion therefore is that the application of Asher must have been filed first and that your office decision holding them to have been filed simultaneously was erroneous and the same is hereby reversed. The contest of Woods will be dismissed and the preference right to enter awarded to Asher.

RAILROAD LANDS—ACT OF AUGUST 5, 1892.

GRANDIN BROS., ET AL,

Purchasers in good faith, prior to January 1, 1891, of indemnity lands from the Northern Pacific railroad company that were subsequently held to fall within the grant to the St. Paul, Minneapolis and Manitoba Ry. Co. in the States of North Dakota, and South Dakota, are within the remedial provisions of the act of August 5, 1892, and may have their titles perfected thereunder in the absence of adverse claims.

Secretary Smith to the Commissioner of the General Land Office, April 16,
(J. I. H.) 1894. (W. M. W.)

By letter of February 10, 1894, your office transmitted to the Department, for consideration and action thereon, the application of John L. Grandin and William J. Grandin as co-partners, as Grandin Bros., and numerous other persons, under the act of August 5, 1892 (27 Stat., 390), who claim to have purchased certain lands from the Northern Pacific Railroad Company, asking that the lands so purchased be patented to said railroad company under the act of July 2, 1864, and that a list thereof be delivered to the Manitoba Company under the act of 1892. In said letter your office expressed the opinion that said applications should be denied.

The applicants have filed here what they denominate "an appeal" from your office conclusion in said letter of February 10, 1894, and in connection therewith, elaborate printed arguments, in addition to which they have been heard orally, in support of their claims.

In order to determine the questions presented by these applications, it becomes necessary to construe the act of August 5, *supra*; the title, preamble and sections, one and two of which read as follows:

An act for the relief of settlers upon certain lands in the States of North Dakota and South Dakota.

Whereas under the rulings of the General Land Office the extension into Dakota Territory, now States of North Dakota and South Dakota, of the limits of the grants of land made by Congress to aid in the construction of the several lines of railroad now owned by the Saint Paul, Minneapolis and Manitoba Railway Company was denied, and in consequence of said rulings lands within the limits of the said grants in the said States have been claimed, settled upon, occupied, and improved by numerous persons in good faith under color of title or of right to do so derived from the various laws of the United States relating to the public domain, and are now claimed by them, their heirs, or assigns, and many of said lands have actually been patented to such occupants or to their grantors; and

Whereas under recent construction of said grants the said occupants, improvers, or purchasers, are liable to be evicted from their holdings: Now, therefore, for the purpose of relieving the said occupants, improvers, and purchasers of the said granted lands from the hardship of being now deprived of the same under the circumstances aforesaid,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior shall, as soon as conveniently may be done, caused to be prepared and delivered to the said railway company a list of the several tracts which have been purchased, claimed, occupied, and

improved, as stated in section two of this act, and are now claimed by such purchasers or occupants, their heirs or assigns, according to the smallest government subdivisions. Within a reasonable time after the receipt by the said railway company of the said list, it shall execute under its corporate seal and deliver to the Secretary of the Interior its deed of conveyance releasing to the United States all its claims upon the lands described in said list, and shall also procure and cause to be released to the United States all liens and claims to said lands derived through or under said company, whereupon all right, title, and interest of the said railway company to each of such tracts shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railway company, and all qualified persons who have occupied and made improvements on said lands, as herein provided, or who have purchased said lands in good faith, their heirs and assigns, shall be permitted to perfect their titles to said lands according to law as if said grants had never been made.

Sec. 2. That the said railway company is hereby permitted to select, in lieu of any lands forming odd-numbered sections or parts thereof situated in the State of North Dakota or in the State of South Dakota, within the ten-mile limits of a grant of lands made to the Territory of Minnesota by act of Congress, entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama, to aid in the construction of a certain railroad in said State, approved March third, eighteen hundred and fifty-seven, as amended by an act of Congress, entitled "An act extending the time for the completion of certain land-grant railroads in the States of Minnesota and Iowa, and for other purposes," approved March third, eighteen hundred and sixty-five, and of a grant made by act of Congress entitled "An act authorizing the Saint Paul and Pacific Railroad Company to change its line in consideration of a relinquishment of lands," approved March third, eighteen hundred and seventy-one, opposite to and coterminous with such portion of said railroad as was constructed and completed within the time required by the said grant and the acts amendatory thereof for the construction and completion of the whole of said railroad, which, prior to January first, anno Domini eighteen hundred and ninety-one, any person had purchased or occupied or improved, in good faith, under color of title or right to do so, derived from any law of the United States relating to the public domain, but not including any lands within the limits of the grant, to aid in the construction of the Saint Vincent branch of said road, as located under the act of March third, eighteen hundred and seventy-one, upon which any person or persons had, in good faith, settled and made or acquired valuable improvements thereon prior to March, eighteen hundred and seventy-seven, an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual government survey which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection lying within any State into or through which the railway owned by said railway company runs, to the extent of the lands so relinquished and released:

This statute clearly belongs to the class of laws known as remedial statutes, which are usually enacted to remedy some mischief done prior to their passage. All such laws are to be liberally construed, so as to effectually accomplish the remedy intended to be given. See 23 Am. and Eng. Enc. of Law, Subject, Statutes 414, 416; Opinion of Att'y-Gen. Garland construing the act of March 3, 1887, (6 L. D., 272).

In Endlich on Interpretation of Statutes, Sec. 103, it is said:

It is said to be the duty of the judge to make such construction of a statute as shall suppress the mischief and advance the remedy; and the widest operation is

therefore to be given to the enactment, so long as it does not go beyond its real object and scope. When, for instance, the language, in its usual meaning, falls short of the whole object of the legislature, a more extended meaning may be attributed to it, if fairly susceptible of it. The scope of the act being ascertained, the words are to be construed as including every case clearly within that object, if they can do so by any reasonable construction, although they point primarily to another or a more limited class of cases.

In Sutherland on Statutory Construction, Sec. 410, it is said:

A remedial statute must be construed largely and beneficially so as to suppress the mischief and advance the remedy. And if its words are not clear and precise, such construction will be adopted as shall appear to be the most reasonable, and the best suited to accomplish its object; a construction which would lead to an absurdity will be rejected. And, generally, it may be affirmed that, if a statute may be liberally construed, everything is to be done in advancement of the remedy or the purpose intended that can be done consistently with any construction that can be put upon it. The substance of the act is principally regarded and the letter is not too closely adhered to.

In Potter's Dwarries, page 231, it is said:

A remedial act shall be so construed as most effectually to meet the beneficial end in view, and to prevent the failure of the remedy. As a general rule, a remedial statute ought to be construed liberally.

See, also, Sedgwick on the construction of statutes, page 309, wherein it is said:

So again it has been said in the case of a remedial act, that everything is to be done in advancement of the remedy that can be given, consistently with any construction that can be put upon it.

The title of the act of August 5, *supra*, seems to embrace only "settlers" on these lands in the States of North and South Dakota, and if in construing it the title should be held to control the language found in the body of the act, then its provisions would be limited to the claims of actual settlers. But it is well settled that in construing federal statutes, the title of an act cannot be used to extend or restrain positive provisions found in the body of such act. It is only when they are doubtful, obscure and ambiguous that resort may be had to the title of an act in construing it. *Postmaster-General v. Early* (12 Wheaton, 137); *United States v. Fisher* (2 Cranch, 358); and *Hadden v. Collector* (5 Wall., 107). In the latter case Justice Field, referring to the title of an act, says:

The title of an act furnishes little aid in the construction of its provisions.
* * * It cannot be used to extend or restrain any positive provision contained in the body of the act. It is only when the meaning is doubtful that resort may be had to the title, and even then it has little weight. It is seldom the subject of special consideration by the legislature.

In addition to these rules for construing remedial statutes, I think there are some other rules of law that have a direct application to the construction of the act under consideration. One of them is, that in construing a statute, a court may refer to the history of the times, and

the conditions of the persons and things to be affected by the act under consideration. See *Aldridge v. Williams* (3 How., 9); *United States v. Union Pacific R. R.* (91 U. S., 72); and *District of Columbia v. Washington Market Company* (108 U. S., 243.) And this practice has been followed by the Department, an instance of which may be found in Secretary Noble's decision in *Townsite of Kingfisher v. Wood, et al.* (11 L. D., 330).

In construing a statute, the state of things, as they appeared to the legislature at the time of the enactment, may be considered. *Platt v. Union Pac. R. R. Co.* (199 U. S., 481).

With these general principles in view, it seems to be proper to briefly recur to the condition of these laws before, and at the date of, the passage of the act of August 5, 1892, as well as the relations of these applicants in respect to the lands claimed by each of them respectively.

On the 11th day of June, 1873, the indemnity lands of the Northern Pacific Railroad Company in the Territory of Dakota were withdrawn. The lands in question are included within the lands so withdrawn. Prior to 1883, the Northern Pacific Railroad Company had selected these lands as indemnity, in lieu of lands lost in place. The lists of selection were approved by the local officers, and by them forwarded to your officers, where they remained without any action thereon, or approval thereof.

On or about the 15th of November, 1876, said railroad company sold and deeded for a consideration of three dollars per acre, to Grandin Bros. the lands applied for by them. In 1877, they broke some 2800 acres of the land, and since that time they have continued to cultivate the same; they have also broken, from time to time, other lands included in their purchase from said Company, until they now have a farm there of about 14,000 acres under cultivation, together with valuable and expensive buildings, machinery, elevators, and stock necessary to conduct the business. They have also paid all taxes on the lands they purchased since the date of their purchase. They are still working, cultivating and claiming the lands so purchased.

Under the rulings of the Land Department that the several grants to aid in the construction of the St. Paul, Minneapolis and Manitoba main line, and St. Vincent Extension Railways did not extend west beyond the State line of Minnesota, numerous persons were permitted to settle upon, and enter lands in North and South Dakota, which, under the decision of the supreme court of the United States, in the case of the St. Paul, Minneapolis and Manitoba Railway Company v. Ransom Phelps (137 U. S., 528) were found to be within the ten-mile primary limits of the grant to said road, and to have passed to that road thereunder. The lands involved in the applications of Grandin Bros. were situated in the odd-numbered sections, and as they were within the indemnity limits of the grant to the Northern Pacific Railroad Company, they were supposed to be properly subject to selection

by that company, until the Phelps case was decided by the supreme court, wherein it was held by that august tribunal that the Manitoba Company's grant extended west of the west line of the State of Minnesota, and by such holding these lands fell within the primary limits to the Manitoba Company. The Phelps case was decided December 22, 1890, and definitely settled the status of these lands. The right of the Manitoba Company attached to these lands upon its definite location December 19, 1871. It followed that rights acquired after that date to such lands by settlers and claimants under the pre-emption, homestead, and other land laws of the United States, as well as rights of purchasers from the Northern Pacific Railroad Company of its indemnity lands, must give way, and become subservient to the rights of the Manitoba Company, under its grant. I am not fully advised as to the number of such settlers, claimants, and purchasers, but from the long lapse of time—from December, 1871, to December, 1890—and the generally conceded fertility of the soil of the valley of the Red River of the North, where this land lies, and its adaptability to farming on an extensive scale, it is entirely safe to assume that the greater part of these lands were during that time settled upon, entered or claimed under the public lands laws, or by purchasers from the Northern Pacific Railroad Company. To provide for a just and proper disposition of these matters, and to preserve and protect, as far as possible, the rights and interests of all concerned, Congress passed the act of August 5, 1892, *supra*.

The precise question to be determined in the case at bar is, whether purchasers in good faith, of indemnity lands from the Northern Pacific Railroad Company are entitled to have their titles thereto perfected under the provisions of the act of August 5, *supra*.

The preamble of said act recites: "Now, therefore, for the purpose of relieving the said occupants, improvers, and purchasers of said granted lands, from the hardship of being now deprived of the same." Section one directs the Secretary of the Interior "to cause to be prepared and delivered to said railway company a list of the several tracts which have been purchased, claimed, occupied and improved as stated in section two of this act, and are now claimed by such purchasers or occupants, their heirs or assigns, according to the smallest subdivisions."

The language used in section two of the act shows that Congress intended to include purchasers, as well as occupants and improvers, for it plainly says that:

Any person who had purchased or occupied or improved, in good faith, under color of title or right to do so, derived from any law of the United States relating to the public domain, but not including any lands within the limits of the grant to aid in the construction of the Saint Vincent branch of said road, as located under the act of March third, eighteen hundred and seventy-one, upon which any person or persons had, in good faith, settled and made or acquired valuable improvements thereon prior to March, eighteen hundred and seventy-seven.

From these provisions it is quite clear that all purchasers, who had purchased prior to January 1, 1891, in good faith, under color of title or right to do so, derived from any law of the United States, relating to the public domain, are included within the benefits bestowed by the act. Indeed, the terms used seem to be so broad and comprehensive that they embrace almost any and every claim of a legal character, that could be applied to land.

Grandin Bros. claim under deeds from the Northern Pacific Railroad Company, which, under the circumstances of the case, is sufficient to invest their claim with the legal characteristic of one holding under "color of title." But the act requires that the claimant under "color of title or right to do so", must show that such claim is derived from *any or some* law of the United States *relating* to the public domain. As to what Congress meant by the use of the term "derived from any law of the United States relating to the public domain", there may be room for some doubt. Sec. 441 of the Revised Statutes contains the words "relating to," wherein it provides that: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: . . . Second, the public lands."

I conclude that the act granting lands to aid in the construction of the Northern Pacific Railroad, (13 Stat., 365) is a law relating to the public domain, within the meaning of section two of the act of August 5, 1892, and that purchasers in good faith, under color of title from it, are entitled to the benefits of said act, where there is no valid superior adverse claim to the land so purchased, originating under the settlement, or other laws of the United States.

There is nothing in the papers before me at this time to show that there is any adverse claim or claims to the lands claimed by Grandin Bros. and the other claims now before me.

These applications will therefore be allowed to be placed on the list directed to be prepared by the first section of the act of August 5, *supra*, subject to the rights of any valid subsisting adverse claim of any claimant to any part of the lands covered by such applications.

If no adverse claim shall be asserted for any of the lands embraced in these applications, within a reasonable time, then these claimants may perfect their titles to the land claimed by them, and in such cases the patent should be issued to the Northern Pacific Railroad Company, and the lands embraced in such patents charged to said road in the adjustment of its grant.

The applications and accompanying papers of Grandin Bros. and the several other persons, transmitted by your office for action, are herewith returned, with direction that they be disposed of in accordance with the views herein expressed.

OKLAHOMA TOWNSITES—DEPOSITS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 16, 1894.

To the TRUSTEES OF TOWNSITES

IN THE U. S. LAND DISTRICTS,

Oklahoma Territory.

In the matter of the deposits to be made daily by each claimant to cover expenses in town-lot contest cases the regulations of July 10, 1890 (11 L. D., 24), will apply when there are but two claimants.

When there are three or more claimants for a lot the deposit which each claimant shall be required to make daily shall be ascertained by dividing the sum estimated to be sufficient to cover and pay all expenses of such proceedings for the day by the number of claimants less one. The purpose of this is to require a deposit in excess of the actual expenses, but only such excess as will enable you to return to the successful claimant the deposit made by him, as provided in said regulations.

Very respectfully,

HOKE SMITH,
Secretary.

DESERT ENTRY—ORDER OF SUSPENSION—APPLICATION TO CONTEST.

SYPHERT ET AL. v. CADY.

The allegations in an affidavit of contest against a desert entry will not be held insufficient where in effect a charge of fraud is made, in that the entry covered lands not contemplated by the desert act.

A charge of failure to effect reclamation within the statutory period will not lie where during the period of alleged default the entry is suspended by departmental order.

The local officers may properly reject an application to contest an entry if in their judgment the charge as laid against the entry does not justify a hearing.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) *16, 1894.* (E. M. R.)

This case involves the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 30, T. 28 S., R. 26 E., Visalia land district, California.

The record shows that on April 19, 1877, M. K. Cady, jr., made desert land entry of the above-described tract.

M. E. Pearson filed an application to contest on January 12, 1891, against the N. $\frac{1}{2}$ of the land in issue, and on February 9, 1891, Pearson and S. L. Syphert filed applications to contest against the entire entry; the former claiming a preference right to enter the N. $\frac{1}{2}$, and the latter a preference right as to the SE. $\frac{1}{4}$

The grounds upon which these contest affidavits were based were stated to be as follows:

That said land was entered by fraud in the inception of said entry; that said land will produce native grasses sufficient in quantity, if unfed by grazing animals, to make an ordinary crop of hay in usual seasons; that said land will produce without irrigation a crop of barley, potatoes, or other agricultural crop in amount to make the cultivation reasonably remunerative; that more than three years have elapsed since the filing of said entry and claimant has not conducted water on said land or made any ditches or means of irrigation; that claimant has not reclaimed said land; that, on information and belief, contestant avers that claimant has no water right available for irrigation of said land.

These affidavits of contest were on June 13, 1892, rejected by the local officers "because the allegations do not attack the validity of entry at date of entry, and the allegations as to reclamation are premature and the allegations as to fraud are not specific."

Upon appeal your office decision of September 26, 1892, sustained the holding below. Both applicants appealed to this Department upon the following grounds of error:

First: The contestant in his complaint alleges that said entry was made by fraud in the inception of said entry and alleges the facts constituting said fraud;

Second: Contestant does allege in what particular the land was not desert, when, in fact, he alleges that said land would at all times mentioned, produce crops of grain, vegetables or hay;

Third: Said officers decided the allegations as to non-reclamation are premature, when, in fact, it has been more than fifteen years since entry and no reclamation has been made.

The charge that the land was entered by fraud in the inception of the entry, should be read together with the allegation that the "land will produce native grasses" etc.; when so read the charge becomes equivalent to an allegation that the fraud in the entry consisted in entering, under the desert law, land which was not contemplated by its provisions.

In *Silveria v. Paugh* (18 L. D., 2), it was held that: "The allegations in an affidavit of contest will not be held insufficient if the charges therein taken together, set forth a state of facts that warrant cancellation."

The second exception comes under the reasons given in reference to the first.

The third error alleged is that it was error to hold that the contest was premature. The act opening these lands to entry allowed three years in which to make reclamation. September 28, 1877, your office suspended this entry and it so remained until after notice of the departmental decision in *United States v. J. B. Haggin* (12 L. D., 34), January 12, 1891.

The contention now is that, as this entryman did not comply with the strict letter of the law in the matter of the reclamation of the land within the three years allowed from date of entry, he can not now do so.

In *Sharp v. Harvey* (16 L. D., 166), it was held that "the period of time covered by the departmental order of January 12, 1877, suspending Visalia desert land entries should be excluded from the time accorded by the statute for reclamation and submission of final proof." It will thus be seen that the question has already been passed upon.

The law gave the entryman three years in which to comply with its provisions, and during that time, the entry was to be undisturbed; but when the order of suspension came—as it did within less than a year from the allowance of this entry—it operated to make the entry valueless, and it can not legally be urged that, pending the revocation of the order, that the entryman was to continue to expend time and money on the land in complying with the provisions of an act, the benefit of which he might never receive.

The obligation resting upon an entryman under an order of suspension is not the same as under a contest. In the latter class of cases he is required to comply with the law, as if no adverse claim to the land were in existence.

Counsel for appellant argues that the local officers had no authority to dismiss the contest affidavit without ordering a hearing, and cites *McClellan v. Crane* (13 L. D., 258), where it was held that "an objection as to the sufficiency of an affidavit of contest can only be raised by the defendant, and not by him prior to the day set for hearing," but in the case cited a hearing had been ordered and the question was raised between the contestants. This is also true of the case of *Jasmer et al. v. Molka* (8 L. D., 241). In both of the cases cited by counsel the applications to contest were *accepted* at the local offices, and hearing ordered. This Department has never held that the local officers could not reject an application to contest.

Your office decision is accordingly reversed.

HOMESTEAD CONTEST—CHARGE OF FRAUD.

OVERLY *v.* HEWITT.

A charge of fraud against an entry can not be established by evidence showing the fraudulent acts of a third party in relation thereto, if the connection of the entryman therewith is not proved.

Secretary Smith to the Commissioner of the General Land Office, April
(J. T. H.) 16, 1894. (G. B. G.)

On October 20, 1890, William H. Hewitt made homestead entry for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 17, T. 29 N., R. 5 E., Seattle land district, Washington, and offered commutation final proof thereon May 23, 1891, but before any action was taken thereon by the local officers, it appears that the matter was referred to a special agent for investigation.

On November 13, 1891, the plaintiff, William L. Overly, filed a protest against allowing commuted cash entry on the final proof offered, alleging:

That said William H. Hewitt, claimant as aforesaid, had not at any time prior to the date that he offered his said final proof and payment, as aforesaid, under the commutation act, established his actual bona fide residence upon the said tract of land, and has not since the said 23d day of May, 1891, established an actual bona fide residence upon the said tract of land; that the said Hewitt did not at any time before he offered his final proof and payment for the said tract of land, nor has not since said date, resided upon the said tract of land, as required by law that the said William H. Hewitt did not make the aforesaid entry in good faith, to acquire for himself a home and farm, but made said entry solely for speculative purposes, and through fraud of the homestead act, under which said entry was made, and that said William H. Hewitt seeks to acquire title to the said tract of land in question, under the commutation act, through fraud and in violation of the said act.

There are other matters set out at length in the protest affidavit, but the specific charges are as above quoted.

On November 17, 1890, Special Agent H. C. Gordon submitted his report herein to the local office, in which report he expresses the opinion "that claimant took this land for the speculative value with which the building of a town about him would create."

A hearing was had, and on April 21, 1892, the register and receiver rendered their joint opinion, in which it was held that the entry was made for the purpose of speculation, and recommended the cancellation of claimant's entry.

Hewitt appealed, and on September 29, 1892, your office reversed the finding of the local officers, dismissed the contest, and approved the commutation proof offered by the homestead claimant.

From this decision protestant Overly appealed, and the case is now before the Department on the following assignment of errors, viz:

- 1st. In overruling the decision of the local officers.
- 2d. In holding that contestant had not sustained his charges.
- 3d. In holding that no evidence of bad faith on Hewitt's part appeared.
- 4th. In holding that no evidence that Hewitt's entry was made for speculative purposes appeared.
- 5th. In not giving sufficient weight to the evidence and documentary evidence in the case.
- 6th. In holding that Hewitt had complied with the homestead law as to residence.
- 7th. In not holding that Hewitt's entry was illegal and fraudulent, having been made for use for townsite purposes, and not for a home.

Without attempting to consider these specifications *seriatim*, it may be said that the controlling questions in the case are:

1st. Has the claimant complied with the law as to settlement and improvements?

2d. Was the entry made for speculative purposes?

On the first question, under the record, there can be no reasonable doubt, as the proof shows that the claimant went on to the land at the time of making the entry, and had remained there practically all of the time up to the date of offering his final proof, and that he had made

improvements up to that time beyond what is usually accomplished by homestead claimants, for the same length of time.

On the second question I have had some difficulty in arriving at a conclusion. I have before me conflicting decisions of your office and the local land office, and the environments of the case are such as preclude all idea of a cursory examination, or a brief statement.

It is in evidence that the claimant, William H. Hewitt, is the son of Henry Hewitt, Jr., a man of large fortune and speculative tendencies, and although not proven affirmatively, it is a fair presumption from the record, that his son, the claimant, was a young man of unsettled habits and largely dependent on his father, up to the time he entered the land, for support. That he was a short time before the entry was made, living in the city of Tacoma, and that his father expressed a desire to get him away from his associations. To this end, he persuaded him to enter the land in controversy. It appears further, that the said Henry Hewitt, Jr., by his agent, W. F. Brown, began the purchase of land at, and in the neighborhood of the present town site of Everett, August 5, 1890, the ostensible purpose of such purchase being to secure a boom site, and put in a mill at the mouth of the Snohomish River. Said agent was also instructed to look out a homestead for William H. Hewitt, in the neighborhood of these contemplated improvements, and on the 20th day of October, following, said Brown negotiated the relinquishment of the land in question from one William Shearer, for the sum of \$2,000, and when the present claimant made entry for the land he executed to his father his promissory note for the amount. On November 19, 1890, the Everett Land Company was incorporated, under the laws of the State of Washington, with Henry Hewitt, Jr., as one of the incorporators and president of the company.

In pursuance of the objects which are set forth in the articles of incorporation, the company has since purchased large tracts of land near the mouth of the Snohomish River, platted the same, sold town lots, made valuable improvements, *et cetera*, the result of which is the present town of Everett, Snohomish county, Washington, having a population, as stated by the register and receiver, estimated, at the time their opinion was written herein, at about twenty-five hundred people. The extent of the improvements contemplated by Henry Hewitt, Jr., at the time the entry was made, is largely conjectural. He swears that at the time the relinquishment was bought for his son he only contemplated building a mill, and making small improvements in the vicinity, but an examination of the whole record forces the conviction that he had larger, though perhaps, undefined views of future development.

It is not at all probable that his son was advised, even generally, of his plans, further than that his father intended to carry on a large logging business in the neighborhood, which would require improvements adequate to the undertaking. He so states under oath, and the

surrounding facts and circumstances are largely corroborative, it even appearing that the agent Brown at that time had not thought of possibilities beyond the avowed undertaking.

On the other hand, it is apparent that the land was not worth exceeding one-half of the price paid for the relinquishment, for agricultural purposes under ordinary circumstances, the improvements at that time being practically nominal. Two questions arise touching the general issue of fraud.

1st. Did Henry Hewitt, Jr., negotiate the relinquishment of this land for speculative purposes, and in contemplation of a fraud against the government.

Was there such a community of interests between the claimant and his father, Henry Hewitt, Jr., or between the claimant and the Everett Land Company, as would make him answerable for their acts?

That Henry Hewitt, Jr., knew that the land in controversy would in a very short time be worth largely in excess of its agricultural value, is morally certain. But while this is true, it does not follow that there were not other and stronger considerations than direct personal pecuniary interests involved in the purchase. The natural inclination of the father to direct his son's future along profitable financial lines, is a strong one, and human experience teaches that it is oftener than otherwise a totally disinterested friendship, viewed from a monetary standpoint. For reasons of a kindred nature, it is altogether probable that the prospective value of the property was not the controlling motive for its purchase, but was incidental. It may be said that such considerations belong more to the realm of ethics than of law, but jurisprudence is so interwoven with moral philosophy as to make them practically inseparable. Indeed, one is founded on the other, and when we begin to look for the controlling motives in the "affairs of man," we but go back to primary principles.

But again, assuming that Henry Hewitt, Jr., did contemplate a fraud against the government, and that he anticipated a harvest of pecuniary gain therefrom, all of the witnesses who could know anything of the matter of a positive character, swear that the claimant knew nothing of the projected improvements in the vicinity of the land, beyond what has already been herein stated, and the whole record negatives the idea that he was connected in any way with his father's investments, or with the Everett Land Company, and whether the \$2,000 paid for him by his father to secure the aforesaid relinquishment, was intended as a loan or as a gift, in the nature of an advancement, the conclusion is irresistible that there was no further community of interests between them with reference to the property.

While fraud may be, and usually is, proven by circumstantial and presumptive evidence, to make the presumption of fraud possible in law, the facts upon which the presumption is predicated must be proved, for "There can be no presumption from a presumption," and

the facts on which it is asked that a presumption of fraud in the case at bar be indulged, are themselves presumptive, and inferential.

The decision appealed from is correct, and the same is hereby approved and affirmed.

TIMBER CULTURE CONTEST—GOOD FAITH.

TAYLOR v. JORDAN.

Failure to comply with the letter of the timber culture law may be excused, if there is a reasonable compliance with said law, and good faith is manifest.

Secretary Smith to the Commissioner of the General Land Office, March
(J. I. H.) 17, 1894. (G. B. G.)

On May 23, 1886, John C. Jordan made timber culture entry No. 5616, for the NE. $\frac{1}{4}$ of Sec. 18, T. 1 S., R. 65 W., of the Denver land district, Colorado.

Taylor initiated contest July 10, 1890, alleging in the affidavit that the claimant—

Has failed during the first year after entry to break five acres on this tract; has failed during the second year after entry to break five additional acres, and to cultivate five acres which should have been broken the first year; has failed during the third year after entry to plant the first five acres to trees, tree seeds or cuttings, and to cultivate the second five acres, which should have been broken during the second year after entry; and has failed during the fourth year after entry to plant to trees, tree seeds or cuttings the second five acres.

That he has failed to break and cultivate and plant to trees, tree seeds or cuttings, ten acres on this tract of land, and that these failures continue to exist up to this date.

A hearing was had October 1, 1890. The local officers made no finding of facts, but held simply "Upon a careful examination of all the papers and testimony in the case, we sustain the contest, and recommend the entry for cancellation."

Appeal was had, and on the 31st day of May, 1892, your office sustained the finding of the register and receiver; and held that claimant's work done on the land "bears on its face the suggestion of mere compliance with the letter of the law, and does not evince an intention on the part of the claimant to cultivate timber on the land," and held the entry for cancellation.

Claimant appealed to the Department, and assigns as errors substantially, that your office erred in its finding of facts, and in the application of the law.

It has been frequently held by the Department in its adjudications on timber culture contests, that a default of the entryman in failing to comply with the letter of the timber culture laws, is susceptible of reasonable explanation, and it is now well settled that such default may be excused if there is a reasonable compliance with the law, and

good faith is manifest. See *Andrews v. Cory* (7 L. D., 89), also, *Griffin v. Forsyth* (13 L. D., 254), and cases therein cited.

It follows that the only real issue made in this case on appeal, is one of fact. Do the acts of claimant manifest good faith in his dealings with the government of the United States, by a bona fide effort to comply with the requirements of the law?

The claimant states in his own behalf:

I had five acres plowed in the spring of 1887, and five acres more plowed in the spring of 1888, during the month of May. In the fall of 1888, I sowed five acres of rye, cultivated it with a harrow. In 1889, I planted five acres in tree seeds, walnut and locust.

On further examination, he says that the five acres sown in rye, were the first five acres broken, and that the tree seeds were planted on the same five acres. The tree seeds were planted in the fall of 1889. That no work had been done on the land in the year 1890, up to May 26, 1890, but that he was making arrangements to have the ground plowed. That his wife was taken sick some time in April, and lay in bed with typhoid fever for about four months. That his family consisted, besides his wife, of only a little girl about twelve years old; and that during said sickness the wife was dependent on him for nursing; that he did all the cooking, and all other work that was done about the place all that summer. That he is a poor man, and has no way of getting money except by labor.

In this statement of facts the claimant is corroborated by disinterested witnesses.

It further appears from the record that none of the rye sown, or the tree seeds planted, ever came up, and while it is in evidence that the plowing and cultivation was not of the best character, there is abundant proof that the failure was due largely to drouth, and there is no strong presumption raised on this account that claimant was not acting in entire good faith.

In my judgment, the claimant herein has acted in good faith, and the contest ought to be, and the same is, hereby dismissed.

The decision appealed from is reversed, and the case remanded for proceedings consistent with this opinion.

PRACTICE—MOTIONS FOR REVIEW AND REHEARING.

DEPARTMENT OF THE INTERIOR,
Washington.

RULE 114.

Rule 114 of the Rules of Practice is rescinded, and the following substituted therefor; this order to take effect June 1, 1894:

RULE 114. Motions for review, and motions for rehearing before the Secretary, must be filed with the Commissioner of the General Land

Office within thirty days after notice of the decision complained of, and will act as a supersedeas of the decision until otherwise directed by the Secretary.

Each motion must state concisely and specifically, without argument, the grounds upon which it is based.

On receipt of such motion, the Commissioner of the General Land Office will forward the same immediately to this Department, where it will be treated as "special." If the motion does not show proper grounds for review or rehearing, it will be denied and sent to the files of the General Land Office, whereupon the Commissioner will remove the suspension and proceed to execute the judgment before rendered. But if, upon examination, proper grounds are shown, the motion will be entertained, and the parties notified, whereupon the moving party will be allowed thirty days within which to file an argument and serve the same on the opposite party, who will be allowed thirty days thereafter in which to file and serve an answer; after which no further argument will be received. Thereafter the case will not be reopened, except under such circumstances as would induce a court of equity to grant relief against a judgment of a court of law.

All rules or parts of rules inconsistent herewith are rescinded.

HOKE SMITH

Secretary.

STATE SELECTION—CERTIFICATION—RELINQUISHMENT.

STATE OF WYOMING.

The certification of lands granted to the State by the act of July 10, 1890, conveys the fee simple of the lands so certified; and the Department is thereafter without jurisdiction over said lands.

Where lands not subject to selection under said grant, on account of their mineral character, have been erroneously certified, the State may relinquish the same, and be permitted to select other lands in place thereof.

Secretary Smith to the Commissioner of the General Land Office, May 16, (J. I. H.) 1894. (F. L. C.)

On February 15, 1894, the Department, on your office recommendation, approved clear list No. 1 of selections made by the State of Wyoming, for the deaf, dumb and blind asylum, in Laramie county.

By your office letter of April 12th was transmitted to the Department a motion for review of said action, filed by F. J. Stanton *et al.*

The list as approved was for 15,512.52 acres. The selections were made in part satisfaction of the grant to the State by section 11 of the act of July 10, 1890 (26 Stat., 222).

Your office letter forwarding the motion for review states that certified copy of said approved list No. 1 was transmitted to the governor of Wyoming on March 3, 1894.

As the act of 1890 making the grant does not require patents to be issued in these cases, the certification of the lists by your office under seal conveys the fee simple of the lands so certified (Sec. 2449 of the Revised Statutes), and this Department is without jurisdiction to further control any of said lands. (*Moore v. Robbins*, 96 U. S., 530.)

It follows that it can not grant the motion to review and reconsider the approval of list No. 1, as asked. The averments in said motion and accompanying affidavits are such, however, as to warrant the Department in taking steps looking to the recovery of title, on the ground that the lands were not properly subject to selection because of their mineral character.

Since the receipt of the motion for review, there has been filed in the Department, through your office, a letter dated April 12, 1894, from the State Board of Land Commissioners, referring to certain petitions and protests filed in their office with a view to securing revocation by the proper authority of the approval of list No. 1, mentioned herein, because the tracts embraced therein "cover rich mineral lands, known as the Silver Crown Mining District."

The State Board of Land Commissioners, in their letter before me, and pursuant to a resolution, which they state was entered April 12, 1894, request "that the title in such lands may revert to the United States, and that the State of Wyoming be permitted to select other public lands in lieu thereof."

In view of the showing made by the petitioners, who brought the motion for review of the approval and certification of said list No. 1, the request of the State Board will be granted, and you will cause proper form of conveyance from the State to the United States to be prepared and forwarded for execution. Said conveyance should set out the reasons for the relinquishment and transfer, and upon its acceptance by the land department, the State will be permitted to select a like amount of lands properly subject to selection.

OKLAHOMA TOWNSITE-SCHOOL FUND.

J. C. ROBERTS.

The proof of organization required of a municipality that applies for the proceeds of a cash entry under section 22, act of May 2, 1890, may be accepted as satisfactory where it shows the organization of the village to which the money is payable, and the consolidation of said village with another municipality, although the previous organization of the latter is not shown.

Secretary Smith to the Commissioner of the General Land Office, May 16,
(J. I. H.) 1894. (C. W. P.)

With your office letter "M" of February 21, 1894, you transmit the application of J. C. Roberts, as agent of the city of Kingfisher, Okla-

homa Territory, for the payment of \$375.00, paid to the Secretary of the Interior by W. D. Fossett for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 15, T. 16, R. 7 W., being cash entry No. 593, Kingfisher land office, Oklahoma Territory, under the provisions of section 22, of the act of May 2, 1890 (26 Stat., 81).

In the case of A. L. Cockrum (15 L. D., 335), it was held that in such cases, before the money can be paid over, there must be satisfactory evidence that the municipality has been organized as required by the laws of the Territory. And it was declared that there must be the evidence detailed in the opinion in said case, to which it is only necessary to refer.

In this case the evidence is satisfactory as far as it goes; but there is no evidence of the organization of the village of Kingfisher City. But the evidence, showing the organization of the village of Kingfisher, to which money is payable, being satisfactory, and the evidence of the consolidation of the said village with the village of Kingfisher City, being also satisfactory, the absence of proof of the previous organization of the village of Kingfisher City may well be waived.

A certificate will be duly issued, addressed to the honorable Secretary of the Treasury, stating that the city of Kingfisher is entitled to the money applied for; and you are hereby directed to state an account in favor of the city of Kingfisher, Oklahoma Territory, for the use and benefit of the public schools of said city, as requested in your letter.

PUBLIC SURVEYS—CONTRACT.

AUSTIN F. PARSONS.

Special instructions to a deputy surveyor, that in effect lower the rate of compensation stipulated in a contract for a public survey, will not make the sureties on said deputy's bond parties to such modification, and a failure therein, in this respect, would relieve such sureties from liability on said bond in case of action thereon for the recovery of damages.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 16, 1894. (W. M. B.)

I acknowledge the receipt of your letter of March 5, 1894, transmitting contract No. 110 $\frac{1}{2}$ (and bond and other papers) awarded Austin F. Parsons, United States deputy surveyor by the surveyor-general of California, providing for the completion of surveys in Twps. 30 and 31 S., R. 16 E., M. D. M. California, involving payment of maximum rates (\$18, \$15, and \$12) of mileage, in the language of said contract, "where the lines of survey pass over mountainous lands, or lands heavily timbered, or covered with dense undergrowth;" estimated liability, \$1,350, payable from special deposits, as per certificates Nos. 353, 357, 391 and 392, made April 12, 1892.

You state that these surveys are additional to those provided for in the townships designated in contract No. 110, dated June 16, 1893, State of California (17 L. D., 536). After commenting upon the surveys provided for in said contract No. 110, and the surveys under the supplemental contract No. 110½, you say—

I have the further honor to request that this office be authorized to approve contract No. 110½, awarded to Austin F. Parsons, D. S., for the surveys therein designated, at the maximum rates of mileage (\$18, \$15, \$12), as allowed for the work, with the understanding, however, that said rates will only be allowed where "exceptional difficulties," as defined in departmental letter of December 16, 1893, shall be met with along the lines of the survey of lands that are mountainous, heavily timbered, or covered with dense undergrowth, and fully described in the deputy's field notes, showing the exact nature and extent of the same.

Departmental letter of December 16, 1893, disposing of questions and matters of survey under contract No. 110, *inter alia*, held—

I approve recommendations contained in your said letter of November 29, 1893, except as to the allowance of the maximum rates (\$18, \$15, \$12) of mileage for the survey of lands that are "mountainous, heavily timbered, or covered with dense undergrowth."

The supplemental contract now under consideration, of which you request approval by this Department, stipulates for the payment of said maximum rates (\$18, \$15, \$12) of mileage for the survey of lands of stated character, while for such class or character of work executed in the State of California the law expressly stipulates that \$13, \$11, and \$7 are the largest rates of mileage compensation which can be allowed therefor.

Referring to that point, however, in your said letter, you state—

In the event of the approval of said maximum rates of mileage, the surveyor-general will be directed to issue to the contracting deputy supplemental special instructions relative to the conditions under which the maximum rates of mileage will be allowed.

The proposed action of your office, suggested by the above, raises the question as to what extent would such modification of this contract affect the liability of the sureties on the bond of Deputy Parsons, given to secure the contract.

A contract for public surveys, properly executed and regular in all other particulars, furnishes the best and highest evidence regarding the stipulations and undertakings therein contained, and after being awarded and delivered it is of such binding force upon all the parties thereto—either direct or remote—as to require the consent of all such parties to legitimately vary or alter its provisions.

In connection with the question of liability of sureties, under certain conditions, upon the bond of the contracting deputy, made to secure prompt, accurate and faithful performance of this contract, I have carefully considered the material point respecting the modification of the same by means of special instructions to the deputy, whereby the mileage rates (\$18, \$15, \$12) of compensation stipulated in this contract for

the survey of lands "mountainous, heavily timbered, or covered with dense undergrowth," are lowered to the intermediate and statutory rates of \$13, \$11, and \$7 for work of that character.

Instructions to the deputy to that effect would not make the sureties on the bond parties to such modification, and a failure therein, in this respect, would relieve such sureties from all legal liability on the bond securing this contract, in case of any action thereon for recovery of damages.

You will therefore instruct the surveyor general of California to award a new contract for the surveys embraced in this contract, substituting in said new contract the said intermediate rates, \$13, \$11 and \$7, (if the work cannot be done for less) in place of the rates \$18, \$15 and \$12, specified in contract No. 110 $\frac{1}{2}$, stipulating in the new contract payment of said maximum rates (\$18, \$15, \$12) of mileage (in event that contract cannot be awarded at lower rates) where the lines of survey pass over lands possessing "exceptional difficulties" of survey, as defined in the case, State of California (17 L. D., 536).

In all matters of survey involving mileage rates of compensation, requiring the approval of this Department, where such rates of mileage stipulated in the contract for a designated character of work, not in accordance with the statute rates prescribed for work of that character, you will instruct the surveyor-general of California to so draw and execute contracts for the completion of the proposed surveys as to conform to the requirements of the statute.

Observance of such a practice in the future, on the part of all surveyors-general, in drawing contracts so as to conform to the statutory provisions affecting public surveys in their respective States, relative to rates allowed for work of a character designated in the act of appropriation, would doubtless obviate delay in many instances in the award of contracts involving rates of compensation requiring approval of this Department before the same become completed contracts.

STATE SELECTIONS—MINERAL LANDS.

STATE OF MONTANA.

When selections are made in what are known, or regarded as mineral belts, or in proximity to lands claimed or returned as mineral, the State, or party making selection, should be required to give notice by posting and publication of the selections, describing the lands selected.

Secretary Smith to the Commissioner of the General Land Office, May 16,
(J. I. H.) 1894. (F. L. C.)

By your office letter of March 17, 1894, were submitted for departmental approval clear lists of selections by the State of Montana, in the Helena land district, in part satisfaction of the grants made by section 17 of the act of February 28, 1889 (25 Stat., 676).

Said lists are as follows:

	Acres.
No. 1, for agricultural colleges	18,054.26
No. 2, for a school of mines	15,670.90
No. 2, for State normal schools	15,509.37
No. 2, for a State reform school	16,788.94

The aggregate amount of land thus selected is 66,023.47 acres.

It appears from an examination of the certificates of the mineral division of your office that some of the lands selected are in townships, portions of which were returned as mineral by the U. S. Surveyor-General, but said certificates show that none of the selections fall within the limits of the lands thus reported as mineral.

An inspection of diagrams accompanying the lists show that, with one or two exceptions of small tracts, the lands selected in townships containing land returned as mineral are not contiguous to the land so returned, and that in most cases they are quite remote, ranging from one to five miles away.

Finding no good reason for objecting to your office recommendation, the lists herein mentioned are approved and returned herewith.

In this connection, I would suggest, for the guidance of your office in the consideration of lists of selections calling for action hereafter, and to prevent possible conflict, that, when selections are made in what are known or regarded as mineral belts, or in proximity to lands claimed or returned as mineral, the State or party making selection be required to give notice by posting and publication of the selections, describing the lands selected. If this be done, any one having an adverse claim or right will be afforded an opportunity to be heard, and if silent will be estopped from complaining.

PRACTICE—MOTION FOR REVIEW—REHEARING.

SHIELDS *v.* McDONALD.

In computing the time allowed for filing a motion for review, where notice of the decision is given through the mail to resident counsel by the General Land Office, such notice must be regarded as served on the third day after it is mailed, and such day of service excluded.

A motion for review must be denied where the questions of law and fact raised thereby were fully considered by the Department in its disposition of the case.

A rehearing on the ground of newly discovered evidence will not be granted if the new evidence relates to matters not material under the issue at bar.

Secretary Smith to the Commissioner of the General Land Office, May (J. I. H.) 21, 1894. (W. M. W.)

On the 27th of May, 1893, your office transmitted, on the part of James McDonald, motion for review of the decision of the Department, rendered on the 27th of March, 1893, in the case of Phronie D. Shields against said McDonald.

The land involved is the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 35, T. 49 N., R. 9 W., Ashland land district, Wisconsin, for which McDonald made homestead entry on the 23d of February, 1891. This land is a part of that restored to the public domain by the forfeiture act of September 29, 1890, (26 Stat., 496), but was not opened to entries or filings until the 23d of February, 1891, the date of McDonald's entry.

Upon the allegations of Shields, that she settled on the land in good faith, on the 25th of September, 1890, and had since resided thereon, and made valuable improvements, a hearing was had on the 6th of May, 1891, which resulted in a decision by the local officers, adverse to her claim.

On the 25th of April, 1892, your office reversed the decision of the local officers, holding that Miss Shields made the prior settlement on the tract, and had acted in good faith, and should be allowed to make entry, while the entry of McDonald should be canceled. The departmental decision complained of formally affirmed the decision of your office.

Notice of the decision of the Department was mailed by your office to the resident attorneys for McDonald, on the 8th of April, 1893, and their motion for the review thereof was filed and copy mailed defendant's attorney May 10, 1893. Thereupon, the attorney for Shields moved to dismiss said motion for review, on the ground that it "was not filed within thirty days after service of notice of said departmental decision, as required by Rule 77, of the Rules of Practice."

The Rules of Practice necessary to consider, in determining the questions involved, read as follows:

RULE 77.—Motions for rehearing and review, except as provided in Rule 114, must be filed in the office wherein the decision to be affected by such rehearing or review was made, or in the local land office, for transmittal to the General Land Office; and, except when based upon newly-discovered evidence, must be filed within thirty days from notice of such decision.

RULE 114.—Motions for review before the Secretary of the Interior, and applications under Rules 83 and 84, shall be filed with the Commissioner of the Land Office, who will thereupon suspend action under the decision sought to be reviewed, and forward to the Secretary such motion or application.

RULE 97.—Fifteen days, exclusive of the day of mailing, will be allowed for the transmission of notices and papers by mail, except in case of notice to resident attorneys, when one day will be allowed.

It is unnecessary to consider Rule 87, as that relates only to notice of decision "given through the mails by the register and receiver, or surveyor-general", while Rule 97 applies to such notices and papers when served through the mails by your office.

In order to determine this motion, two questions are presented: (1) The day on which the party will be held to have received notice of the decision, in cases where resident attorneys are notified of decisions by your office through the mails. (2) In computing the time allowed

by the Rules of Practice, what day or days, if any, should be excluded, including the day on which service of notice is made.

As to the first question, under Rule 97, the 8th of April, the day of mailing the notice of the decision, and one additional day, the 9th should not be considered in computing the time allowed for filing the motion for review, for under the plain language of the rule, said two days are allowed "for the transmission" of the notice of the decision. In other words, the two full days are allowed for the purpose of *conveying* the notice to the resident attorneys. This being so, it necessarily follows that the receipt, or service, of the notice would take place on the *third* day from the mailing of the notice; in this case, the receipt or service of notice occurred on the 10th day of April, and not before.

As to the second question, the receipt or service of the notice of the departmental decision having taken place on the 10th day of April, the *time* for filing the motion for review began to run from that date. *Peterson v. Fort* (11 L. D., 439); *Cooper v. Arant* (14 L. D., 428).

In *Dober v. Campbell, et al.* (17 L. D., 139), it was held that:

In computing the time within which an appeal must be filed, where notice of the decision is served on the resident attorney, the day of mailing the decision, and one day additional, should be excluded.

Rule 77 requires that a motion for review must be filed "within" thirty days from notice of the decision sought to have reviewed. Mr. Endlich, in his work on the interpretation of Statutes, Section 390, discusses the distinctions that have been made by courts in the interpretation of time, and says:

However this may be, none of the distinctions indicated, seem to have been generally in this country conceded to have much, or controlling weight, and whilst the decisions cannot be said to be in perfect accord, the weight of authority seems to be, that one of the terminal days should be excluded, and that, in general, this should be the first day.

Again, he says, Section 392:

When any matter is required to be done "within" a certain number of days, the day that is the starting point, is excluded.

I think this is a safe rule to follow and apply by this Department in the construction of its rules of practice, and applying it to the case at bar, while the time for filing the motion commenced to run on the 10th day of April, that day should be excluded in computing the time, and as the motion for review was filed on the 10th day of May, following, it was filed within the time required by the Rules of Practice.

It follows that the motion to dismiss must be, and hereby is, denied, and the motion for review will be disposed of on its merits.

The errors assigned in the motion for review relate entirely to matters of law and fact, which were fully considered by the Department when the case was decided on the merits. No new question of law or fact is presented for consideration by it. Under such circumstances, the Department has repeatedly held that motions for review must be

denied. *Pike v. Atkinson* (12 L. D., 226); *Guthrie Townsite v. Paine, et al.* (13 L. D., 562); *Stone v. Cowles* (14 L. D., 90), and many other cases.

There being no sufficient reason shown for departing from the rule in such cases, this motion is accordingly denied.

On the 4th day of May, 1894, counsel for McDonald filed in the Department a motion for a rehearing, based upon the ground of alleged newly discovered evidence.

Two affidavits were filed with the motion, one made by McDonald, and the other by one Augustus L. Crawford. McDonald swears that the case was heard on the 6th day of May, 1891, and that ever since that time he has used due diligence to discover the whereabouts of said Crawford, from whom the plaintiff claimed to have bought the improvements on the land in dispute: that about the 1st of April, 1894, he learned where he was, and on the 14th of that month Crawford made an affidavit relative to his dealings with Shields respecting the improvements on the tract at the time Shields claims to have established residence on it. McDonald swears that the testimony of Crawford "is very material, in view of the testimony of the plaintiff on the trial."

Crawford swears in his affidavit, that from April 7, 1890, to September 15th, of that year, he was in the employ of one Amos Cook, and most of that time he was engaged on the land involved in this case; that on the 15th day of September, 1890, he quit Cook's employ, and went about two hundred miles away from the land in question; that he never at any time, made any bargain with Phronie D. Shields, or with any person in her behalf—

For the sale of the improvements made by said Cook on the land above described; that he never made any bargain with any person, looking toward the sale of said Cook's improvements, or any other improvement on said land; that he never signed any paper purporting to transfer or convey any improvements whatever on said land.

That if there is any such paper in existence, said paper is a forgery; that he never received any consideration from Shields, or any person in her behalf, for said Cook's improvements, or for any improvements on said land; that he never had any dealing with Shields, directly or indirectly, in reference to said improvements. This affidavit is signed by Crawford making his mark.

At the trial, Shields testified that she purchased the improvements from Crawford, who was at that time living on the land, and claiming to own the improvements. She also introduced a written transfer of the improvements to her, which she swore Crawford signed in her presence, dated September 25, 1890, and a written receipt from him, dated September 26, 1890, for \$70, which she testified she paid him for the improvements.

These writings were introduced and received in evidence, over the objection of McDonald, as "irrelevant and immaterial, for the reason

that it does not appear that Crawford had any interest in the land whatever." These writings related to a transaction between the plaintiff and a stranger to the record, respecting a matter that could not in any way affect the rights of either of the parties litigant to the land in controversy; the writings were therefore "irrelevant and immaterial," as well as the parol evidence introduced at the trial, respecting the improvements made on the tract by Cook, who is not asserting any claim or right to the land by virtue of having made such improvements. The alleged newly discovered evidence relates to immaterial matters, and is therefore insufficient as a ground for a rehearing.

Settlement rights, under the public land laws, cannot be acquired by the purchase of the improvements of another. They are only acquired through acts of settlement, performed in person by the party seeking to secure the benefit thereof. *Powers v. Ady* (11 L. D., 175); *Esperance v. Ferry* (13 L. D., 142); *Stone v. Cowles* (14 L. D., 90).

Shields bases her claim upon an actual settlement made on the tract on the 25th day of September, 1890, and a continuous residence thereon since that time, also improvement and cultivation of it. Her claim is clearly sustained by the testimony taken at the trial. Her settlement was made by taking possession of an abandoned log house that was owned by one Cook at one time, but had been abandoned by him. He was introduced by McDonald as a witness in the case, and on the trial he admitted that he laid no claim to the improvements. In effect he swore that he built the house on the tract, and then hired Crawford to hold the claim for him, while he (Cook) went to his home in the State of Maine.

McDonald did not build a house on the tract until about October 12, 1890. Under the evidence, there can be no question but what Shields was the prior settler, and that she has acted in good faith. No injustice was done by the decision of the Department in awarding her the land in dispute. The motion for rehearing is denied.

SETTLEMENT RIGHTS—APPLICATION TO ENTER.

SMITH *v.* MALONE.

No rights are acquired by settlement on lands during the pendency of a departmental order expressly prohibiting such occupation thereof.

An application to make entry of public land cannot be allowed if based on preliminary papers executed prior to the time when said land is legally subject to such appropriation.

Secretary Smith to the Commissioner of the General Land Office, May
(J. I. H.) 21, 1894. (V. B.)

The controversy in this case involves the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 27 T. 49 N., R. 7 W., Ashland, Wisconsin, land district, which land was formerly within the fifteen mile limits of the grant made by the act of

June 3, 1856 (11 Stat., 20), to aid in the construction of what is now known as the Chicago, St. Paul, Minneapolis and Omaha Railway, Bay-field Branch. The lands within those limits were withdrawn for the benefit of that road in 1856, and so remained withdrawn until November 2, 1891, when, said grant having been fully adjusted and the adjustment formally closed, the surplus lands within those limits were by order of Secretary Noble restored to the public domain.

The matter of the status of the restored lands has several times been considered and passed upon by this Department. See *Shire v. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 10 L. D., 85; *Newell v. Hussey*, 16 L. D., 302; same on review, 17 L. D., 369. And it is not now necessary to go into that matter further than to say that in restoring said lands the specific instructions of the Department were to the effect that no rights to any of those lands, either by settlement or otherwise, could be acquired or would be recognized as existing prior to the day on which they were thrown open to entry, that is, November 2, 1891; except claims or rights arising under the provisions of the adjustment act of March 3, 1887 (24 Stat., 556). The lands were particularly valuable, and numerous attempts had been made to obtain prior rights to the best portions thereof by so-called settlers, who intruded upon and occupied the same, utterly regardless of the fact that the lands were in reservation, and who thus endeavored to obtain right to the exclusion of law abiding citizens awaiting in an orderly manner the action of the authorities. Therefore it was that the directions of the Secretary were so positive and inhibitive as against the acquisition or attempted acquisition of any rights or claims prior to the time fixed by him for entry of the lands.

On November 2, 1891, the register and receiver of the Ashland land office received by mail, prior to nine o'clock a. m., an application by Charles H. Stickney to make homestead entry of the NE. $\frac{1}{4}$ of said section, alleging settlement October 27, 1891; a like application of John Malone for the NW. $\frac{1}{4}$ of the same section, alleging settlement October 30, 1891; a like application of Ben. J. Magner for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, same section, alleging settlement June 5, 1891, and a like application of Wilbur F. Smith for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, same section, alleging settlement April 1, 1890.

The local officers held the applications to be simultaneous, and ordered hearings to ascertain the respective rights of the parties, of which all were duly notified. The hearing between Stickney, Magner and Smith was as to the NE. $\frac{1}{4}$. Stickney making default, his application was denied. There being no conflict between Magner and Smith, the contest as to the NE. $\frac{1}{4}$ was ended, and Stickney's rights were eliminated from the record.

The contest as to the NW. $\frac{1}{4}$ was between Malone, Magner and Smith. The finding of the local officers was in favor of Magner as to the N. $\frac{1}{2}$.

of the NW. $\frac{1}{4}$ and in favor of Malone as to the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, recommending the dismissal of Smith's application as to the same. Malone appealed from the finding in favor of Magner for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and Smith appealed from the finding in favor of Malone for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$.

On these appeals your office, on October 10, 1892, decided that no rights were obtained by either of the parties through their alleged settlements, prior to November 2, 1891, when the lands were thrown open to entry; that the applications to enter were simultaneous, and that the lands described therein would be disposed of to the highest bidder among those parties, in accordance with the rule on page 10 of the circular of February 6, 1892; and as to the lands not in conflict the respective parties might complete their entries as soon as the other tracts were disposed of. Magner, Smith and Malone appealed.

The appeal of Malone was not filed in time, and therefore will not be considered. Since the filing of the appeals of Smith and Magner, the latter has filed his relinquishment, dated May 2, 1893, of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and Malone has filed his relinquishment of the same date for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$. This takes Magner out of the case, and leaves the only controversy, on the appeal of Smith, between him and Malone as to the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$.

In view of what has been said as to the status of this land, the clear and positive instructions of my predecessor, as construed in the departmental decision in *Newell v. Hussey*, in 16 L. D., 302, it is plain that your office holding that the parties could obtain no rights by their alleged settlements, prior to the time when the lands were opened to entry, is correct and must be approved.

It appears from an inspection of the record before me that all of the applications to enter were signed, and the accompanying affidavits sworn to, prior to November 2, 1891, the day on which the lands were restored to the public domain, and became subject to entry. All the applications are dated October 31, 1891, and, owing to the alleged distance from the land office, all the affidavits were sworn to before W. M. Tompkins, U. S. circuit court commissioner, on the same day, except that of Malone, which is sworn to October 30, 1891, and an amended affidavit by him sworn to on January 27, 1892.

Section 2290 of the Revised Statutes provides that a person applying for the benefit of the homestead laws "shall upon application to the register of the land office, in which he is about to make such entry, make affidavit," etc. Here the personal presence of the party at the land office was required, and *at the time* of making his application to also make an affidavit showing his qualification to make such entry. Of course, on applying to make entry, the land officers, it was contemplated, would inspect their records, and, if the specified tract was found to be subject to such entry, the affidavit was then made, and, if satisfactory, the entry was admitted. If, however, the record showed the

land to be reserved, withdrawn or otherwise not subject to entry, the application was rejected. All this it was contemplated should be one transaction, performed at the same time and upon the application being made at the district office. But section 2294 of the Revised Statutes provided that where the applicant, or some member of his family, is actually residing on the desired land, and upon which a *bona fide* improvement and settlement have been made, is prevented by reason of distance, etc., from personal attendance at the land office, it will be lawful for him to make the required affidavit before the clerk of the court, etc., and transmit the same, with his application and fees, to the local office. This section was amended by the act of May 26, 1890 (26 Stat., 121), so as to authorize the making of the affidavit before a United States commissioner where the applicant was prevented by distance, etc., from personal attendance at the local office, whether or not residence had been established upon the land applied for. At least, that is the construction which has been put upon the amendatory act in the general circular of 1892, page 9.

But there is nothing in all this which even by implication authorizes the entry of, or the initiation of entry proceedings so as to acquire any rights thereunder, for lands not at that time subject to entry.

That this cannot be done may be asserted as a fundamental principal in the administration of the land laws as old as the system itself. It is a matter of history that originally all who went upon the public lands might be treated as intruders and removed by force if necessary. In the course of time this rule was modified for the benefit of actual settlers with improvements. The modification, however, only went to the extent of giving the settler a preferred right to make entry of the particular tract within a stated time *after* the land became subject to disposal under the general land laws. But no rights are recognized as vested, because of such settlement. Authorities need not be cited for this statement, because the Department and the courts have invariably asserted the rule. And in all the decisions bearing upon the subject it is distinctly held that a right to acquire title to lands can only be initiated *after* they become subject to entry or sale. In the case of *Lansdale v. Daniel*, 100 U. S., p. 113, 166-7, a settler upon the land filed pre-emption declaratory statement therefor *prior* to the time when the plat of survey was filed in the local office, and the court decided that such filing was an absolute nullity, the law allowing such filing only after the plats of survey were returned; and the land was awarded in that case to one who filed his declaratory statement more than two years afterwards.

Entry under the homestead law is the initiation of a right to acquire final title to land subject to such entry by a subsequent compliance with the requirements of law. As a condition precedent to the making of such entry, the applicant must file an affidavit showing his qualifications, etc. Unquestionably the entry cannot be made prior to the

time when the land becomes subject to disposal, and following the case of *Lansdale v. Daniels*, *supra*, such an entry would be a nullity. By a parity of reasoning the application, and papers on which it was made, must likewise be null, void, and of no effect whatever, simply because they were made for the purpose of initiating a right, which, if acquired, would relate back to the date of initiation, and cut off intervening claims; thus establishing a right as of a date when, under the law, no such right could be acquired. And this has been the distinct holding of this Department in many cases. (*Ramage v. Maloney*, 1 L. D., 461; *Wydler v. Keeler*, 13 L. D., 288; *Reed v. Buffington*, 12 L. D., 220, 224; *Mills v. Daly*, 17 L. D., 345-6; and *Ady v. Boyle*, *ibid*, 529, and other cases which might be cited.)

The last two cases are almost identical with the one at bar. In both of them the affidavit and application were dated prior to the time when the land was thrown open to entry, and in both the Department holds that because thereof the entries could not be allowed. In both cases numerous decisions of the Department, confirmatory of the position assumed, are cited, and the departmental circular of January 8, 1878 (4 C. L. O., 167), is quoted wherein the allowance of such entries is positively prohibited.

Entertaining these views, it is clear to me that none of the entries in question can be allowed, and you are directed to instruct the local officers to this effect.

Your decision is accordingly modified.

SETTLEMENT RIGHTS—APPLICATION TO ENTER—REHEARING.

ENSTROM *v.* HART.

A settlement right cannot be acquired by occupancy of land at a time when such action is expressly prohibited by a departmental order.

An amendatory, or supplemental application to enter, filed under a practice of the local office that called for such action, will not be regarded as an abandonment of rights secured under the original application.

A rehearing will not be granted on the ground of newly discovered evidence where the applicant neglects to properly present his case at the hearing before the local office.

Secretary Smith to the Commissioner of the General Land Office, May 21,
(J. I. H.) 1894. (P. J. C.)

The land involved in this appeal is the NE. $\frac{1}{4}$ of Sec. 33, T. 47 N., R. 9 W., Ashland, Wisconsin, land district, and is situated within the limits of the withdrawal made for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, under the acts of Congress approved June 3, 1856 (11 Stat., 20), and May 5, 1864 (13 Stat., 66). On October 22, 1891, it was ordered restored and opened to settlement and entry November 2, 1891.

The record shows that on November 2, 1891, before 9 o'clock, A. M., there was received at the local office the applications of Erick Enstrom and Jennie Hart to make homestead entry of said tract; the latter alleged settlement October 25, preceding, and her application was accepted; and that of the former rejected "because it conflicts with application of Jennie Hart, received at same time, alleging settlement and date thereof." On receipt of notice of the rejection, Enstrom, on November 10, 1891, filed an amended application, alleging settlement May 12, 1890, whereupon the local officers ordered a hearing to determine the prior right of the parties to the land, and as a result thereof they decided that the applications were simultaneous; that the entry of Hart should be canceled, and the right of entry awarded to the highest bidder. Both parties appealed, and your office, by letter of March 30, 1893, affirmed their judgment, whereupon they prosecute appeals to the Department.

The specifications of error on behalf of each of the applicants are almost entirely addressed to the question of settlement prior to November 2, 1891. The decision in the case of *Newell v. Hussey* (16 L. D., 302), and on review (17 L. D., 369), render it unnecessary to consider this proposition, as it was there determined that no rights could attach by reason of settlement prior to that date, when the land was not open for settlement or entry.

In the appeal of Hart, however, a further question is raised. It is contended that it was erroneous not to have held "that Enstrom waived all rights under the application made simultaneously with Jennie Hart, because he failed to appeal from its rejection, and because he made a new application for the same land;" that by the amended application of Enstrom, made subsequent to Hart's entry, he abandoned the first hence he should "not be entitled to enter the land."

It will be conceded that the local officers erred in rejecting Enstrom's first application. It should have been received together with Hart's and declared to be simultaneous, and a hearing ordered under the rule. But it seems that the local officers at Ashland, when these lands were opened, adopted the rule of allowing entry on the application which showed the prior settlement, and, where the applications alleged settlement prior to November 2, they ordered the hearing. In consequence of this practice, it is probable that the second application was filed, and thereupon the hearing was ordered. Under the practice thus pursued, the local officers considered that an issue was raised by the amended affidavit, as to who had the best and prior right, and they then ordered the hearing.

While this practice was not directly in conformity with the rules, yet I am unable to see how any one was prejudiced thereby or deprived of any rights they might be entitled to, and I cannot agree with counsel in their contention that Enstrom waived all rights he acquired under his first application by presenting his second for the same land. The

fact that he made a second application, either as amendatory of or supplemental to the first for the identical tract should not defeat his initiated right.

From an examination of the testimony, I find in your said office decision the facts disclosed are fairly and sufficiently stated, and your judgment affirming that of the local office will therefore be affirmed.

There is before me a motion by Enstrom, corroborated by his affidavit, asking for a re-hearing. The ground upon which this is asked is that Enstrom made a legal settlement on the land on the morning of November 2, immediately after midnight on the night of the first; that this fact was not shown at the trial "for the reason that such evidence was held by the register and receiver to be immaterial," because it was held that the person who made the first settlement, "regardless of the time such settlement was made, if prior to November 2, 1891, was entitled to the entry," and that the evidence now sought to be introduced has become material, under the ruling in the case of *Newell v. Hussey, supra*. As a second ground it is alleged that the defendant has never resided upon improved or cultivated, and has wholly abandoned, said land.

At the trial of this case there was no offer made to prove this alleged settlement on November 2, and the record does not disclose, as stated by counsel, "that such evidence was held by the register and receiver to be immaterial." The plaintiff, in his affidavit, says that immediately after midnight of November 1, "I made a new settlement on the land . . . by beginning a new clearing," and that he has since continued to work on that clearing.

It is not claimed by counsel that a re-hearing is asked on the grounds of newly discovered evidence, but as this is the only ground upon which, at this late a day, such a motion could be granted, it must be so considered. *The fact that parties neglected to present their cases so as to meet the requirements of the law is not a sufficient reason for granting a new trial. Every person is presumed to know the law, and if, when proper opportunity is afforded for the presentation of their cases, they fail to do so, they must abide the result of their neglect. To hold otherwise would encourage a laxity in the presentation of cases that would breed never-ending controversies, and create doubt and uncertainty, instead of stability and confidence, in all proceedings. (Hilliard on New Trials, 2nd Ed., 493, et seq.) †

While the second ground assigned might be sufficient upon which to base a contest, it is wholly insufficient to warrant a rehearing. It would be an entire departure from the original proceeding, something that was not in the issue, or even in being at that time.

The motion is therefore overruled.

Before carrying into effect the offering of the right of entry under this decision holding the applications to be simultaneous, the application by Hart will be suspended pending investigation, which will be ordered by your office in order to determine the bona fides of her appli-

tion, it being charged in the reports of special agents, detailed to make investigation in the matter of the allowance of entries of these restored lands, that the application of Hart was made in the interest of one W. E. McCord. Should the charge be sustained, Enstrom will be allowed to make entry of the land; otherwise it will be put up to the highest bidder, as above directed.

RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890.

ENGLAND v. MARTINSON.

A person claiming a preferred right of entry under section 2, of the forfeiture act of September 29, 1890, must show actual settlement at the date of the passage of said act, and qualification at such time to make homestead entry.

Secretary Smith to the Commissioner of the General Land Office, May 21,
(J. I. H.) 1894. (F. W. C.)

I have considered the appeal by Fred England, in the matter of his contest against the homestead entry No. 2105, by Elling Martinson, covering the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 11, T. 49 N., R. 10 W., Ashland land district, Wisconsin, from your office decision of July 6, 1892, sustaining the action of the local officers in dismissing his contest.

The land in question is a part of that foreited and restored to the public domain by the act of Congress approved September 29, 1890 (26 Stat., 496).

Under instructions issued by your office, entries were not permitted for these lands until due notice of restoration had been given by publication, which notice set February 23, 1891, as the day on which entries would be received.

On that day Martinson made the entry in question, and on March 16th following, England executed an affidavit of contest against said entry, alleging that he settled upon this land in June, 1888, and has continuously resided thereon; that on February 23, 1891, he applied to make homestead entry, as a preferred claimant under the second section of the forfeiture act, which application was refused on account of the prior entry of Martinson, which entry is invalid against and interferes with said preferred right of entry.

Upon this affidavit hearing was had, and on the record made the local officers found that England was not entitled to a preferred right of entry and therefore dismissed his contest, which decision was sustained by your office on appeal.

On the 13th of April, 1893, England executed before a special agent of your office, a relinquishment of any claim to this land and a withdrawal of his appeal.

Subsequently, affidavits were filed by England, his father and his mother, to the effect that they were intimidated by the special agent, under threats of criminal prosecution, and that the relinquishment was not a voluntary act.

In these affidavits, however, it is admitted that England was not of the age of twenty-one years until in October, 1890, subsequent to the passage of the forfeiture act.

It is therefore admitted that he is not entitled to a preferred right of entry under said act, as it required that the party must be an actual *bona fide* settler at the date of the passage of the act and "otherwise qualified" to make a homestead entry.

His contest must therefore fail.

It is sought in the argument of this case to raise some question as to the regularity of the allowance of Martinson's entry, but as no such question is raised by the affidavit of contest, I do not think it necessary to discuss the subject in deciding this case. England having failed to sustain the allegations made in his affidavit of contest, the same must be, and hereby is, accordingly dismissed.

Apart from the record in this case, I have before me the report made by two special agents detailed to investigate the charges preferred against R. C. Heydlauff, who was receiver of the land office at the time the entry by Martinson was allowed. These reports show that there appears to have been collusion between Heydlauff, the receiver, one Arthur Osborn, an attorney practicing before that office and also a partner in the real estate business with said receiver, and one W. E. McCord, in whose interest it is alleged this and other entries allowed at that time were made. If the facts set forth in these reports, which are supported by affidavits, are true, it is evident that the entry of Martinson should be canceled irrespective of the rights of others. I therefore direct that a hearing be ordered, and that the charges of said special agents be made the basis of investigation, at which the truth of the statements contained in said reports may be inquired into, after due notice to all parties. At such hearing a special agent should be present to represent the interest of the government.

PRACTICE—APPEAL—RAILROAD LANDS.

LACHAPELLE *v.* ROSS.

A mistake as to the appellant's name, made by his attorney in signing the appeal, will not defeat consideration thereof, where said appeal properly describes the land involved and the appellant, and is regularly served on the appellee.

The preferred right of entry accorded by section 2, act of September 29, 1890, to "actual settlers" at the date of the passage of said act, is dependent upon acts of settlement followed by the establishment and maintenance of residence in good faith.

Secretary Smith to the Commissioner of the General Land Office, May 21,
(J. I. H.) 1894. (F. W. C.)

I have considered the case of Fred Lachapelle *v.* Gordon Ross, involving the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 9, T. 49 N., R. 9 W., Ashland land district, Wisconsin, on appeal by Ross from your office

decision of May 28, 1892, holding his homestead entry made for said tract subject to the preferred right of entry in Lachapelle, under the provisions of the second section of the act of September 29, 1890 (26 Stat., 496).

This land is a part of that appertaining to the unconstructed portion of the grant made to aid in the building of the Wisconsin Central Railroad, which was forfeited and restored to the public domain by the act of Congress approved September 29, 1890 (*supra*).

The forfeited lands were opened to entry, after due notice by publication, on February 23, 1891, and same day Ross made homestead entry No. 2073 for the land in question.

On March 17, 1891, Lachapelle contested said entry on the ground that he was entitled to a preferred right of entry under the terms of the second section of the forfeiture act, having settled upon said land in June, 1888, and since continuously resided thereon, and that he had improvements upon the land valued at \$400.

Hearing was had at which both parties were present, and upon the record made, the local officers found that—

The contestant fails to show a prior right to the land, his residence was occasional visits to the land, his improvements a small log house uninhabitable, and a little underbrushing. The claimant has a settlement upon the land made in September, 1890, and at that time the improvements of contestant were abandoned practically or were no notice to the claimant.

They therefore recommended that Ross' entry be not canceled.

An appeal was filed to your office in the name of Edward Lachapelle, and for this reason a motion was filed on behalf of Ross to dismiss the same as Edward Lachapelle was not a party to the record.

Your office decision of May 28, 1892, denies said motion and therein it is stated:

The appeal in question is signed "Edward Lachapelle, by Fielder B. Chew, his attorney." At the hearing said attorney appeared for the contestant, Fred Lachapelle. A reference to the papers in the case shows that in sending notice of your decision to contestant's attorney you entitled the case "Edward Lachapelle v. Gordon Ross." The attorney used the same title in his appeal and in the brief thereof. This would seem to account for the mistake, which I think it was, in signing Edward Lachapelle's name to the appeal, instead of the proper appellant. For this reason the motion to dismiss is denied.

In considering the case of the appeal said decision finds—

That Lachapelle went to the tract in controversy in June, 1888, with the intention of making it his home, and that pursuant thereto he built a house and furnished it with sufficient articles to maintain a residence therein. He also, prior to the date of restoration of the land, repaired his house and had it in good condition. His actual personal residence on the land is not entirely satisfactory. But he was obliged by the necessity of earning a living, to be absent a large portion of the time. On the other hand I find that at the date of restoration, viz., September 29, 1890, Ross was not an "actual settler" upon said tract. He had performed no personal acts of settlement prior to that date, and had not established a residence thereon. His trips to the land were simply for the purpose of looking after his interests and did not constitute a residence.

Said decision therefore reversed the action of the local officers and held the entry by Ross subject to the preferred right in Lachapelle. An appeal brings the case before this Department.

The appeal urges error in not dismissing the appeal from the local office as moved, but from a review of the matter I do not think the mistake of the attorney in improperly signing the appeal should deprive the contestant of any rights he might otherwise have gained.

The appeal properly describes the land and the claimant, and was regularly served upon claimant's attorney, and was sufficient to bring the case before your office for consideration upon its merits.

The sole question therefore for consideration is whether contestant is entitled to a preferred right of entry under the terms of the second section of the forfeiture act.

Said section provides:

That all persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation.

It was well known for a number of years preceding the forfeiture that the Wisconsin Central Railroad would not build its road opposite these lands and that at some time they would return to the public domain.

They are generally heavily timbered and for that reason alone have any value.

Numerous applications were presented for them hoping in this way to acquire a prior right, and pretended settlements were made thereon with a hope of holding the lands until they should be restored to the public domain.

In forfeiting these lands Congress undoubtedly knew of this condition and provided for the protection of those who were actual *bona fide* settlers at the date of the passage of the act of forfeiture, and further that they were to be regarded as actual settlers from the date of "actual settlement or occupation."

It will be seen that in this legislation the words "settlement" and "occupation" are used as interchangeable, consequently an "actual settler" here referred to would be an actual occupant of the land.

It is plain that Congress did not mean to grant a preferred right of entry to any one who had made a mere act of settlement upon these lands at some date prior to the declaration of forfeiture, but rather those who were actual *bona fide* settlers upon, or occupants of the land on that date. In the case of *Rene v. Prendergast* (17 L. D., 385), it was said, referring to the act of September 29, 1890 (*supra*),

The act in question protected the rights of the persons, who, on the 29th of September, 1890, were residing upon the land, complying by honest acts with the expressed requirements and objects of the settlement laws then in force, and seeking

in good faith to maintain a settlement and claim thereunder. It expressly provided, that to be entitled to its protection, the persons must be actual settlers in good faith upon the lands "at the date of the passage of this act."

Acts of settlement performed on the lands years before the passage of the act, conferred no rights, unless those acts were followed by such residence as rendered the person an actual settler thereon, on the day the forfeiture act was passed. If, however, those early acts of settlement had been followed by residence, and improvements which had the character of permanency, and had continued until the 29th of September, 1890, the act provided that such person should be regarded as an actual settler from the date of his actual settlement or occupation of the land.

With this brief analysis of the act I will proceed to the consideration of the facts disclosed by the record, relative to Lachapelle's settlement, upon which is based his claimed right of preference.

In June, 1888, he built upon this tract a five log cabin with door and window, but without floor, the cracks between the logs not being mossed.

It was rudely constructed and of doubtful inhabitability and scantily furnished.

Lachapelle is a single man and prior to alleged settlement lived with his father upon the family homestead distant about two miles from the land in dispute.

From June, 1888, to the date of hearing his residence upon this land consisted of occasional visits when he remained a day or so and an occasional stop over night while hunting in the vicinity of the land.

He practically lived, as before 1888, with his father, farming the homestead and working in the woods with others in his father's employ.

About the time of the forfeiture he placed a floor in the cabin and otherwise fixed it up but even then did not take up an actual residence upon the land.

At this time two years and three months had elapsed since his alleged settlement and he was yet unable to do more than make an occasional visit to it.

His purpose is plain; it was to hold the land until restored, by a mere pretense or show of residence thereon.

He was in no sense an actual settler upon or occupant of the land in question on September 29, 1890.

I note that in the brief filed in behalf of the plaintiff it is stated that—

By some combination or arrangement, the details of which could not be brought out on cross-examination at the hearings, these defendants by means of applications executed before a county commissioner, and mailed to the receiver of the Land Office at Ashland, prior to February 23, 1891, secured entries of the lands applied for by them before others had any opportunity whatever to present their claims.

The case before me arose upon an affidavit of contest filed by Lachapelle.

The sole ground of Lachapelle's contest was that Ross' entry was illegal because of his (Lachapelle's) preferred right of entry granted by the act of forfeiture.

Having found that Lachapelle is not entitled to a preferred right of entry, it is unnecessary to consider the acts depended upon by Ross to establish a prior right. Lachapelle having failed to sustain his contest, the same must be dismissed.

The circumstances in the matter of the alleged collusion in the allowance of certain entries at the Ashland office are present in this case, and this entry will be included in the investigation ordered—the directions for which are given in the case of *Fred England v. Elling Martinson* (18 L. D., 1489).

CONTEST—HOMESTEAD DECLARATORY STATEMENT.

LACHAPELLE *v.* HERBERT.

A contest will not lie against a homestead declaratory statement as it does not constitute an appropriation of the land covered thereby, and is no bar to the entry of another.

Secretary Smith to the Commissioner of the General Land Office, May 21,
(J. I. H.) 1894. (F. W. C.)

I have considered the case of *Edward Lachapelle v. Hamilton J. Herbert*, involving the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 7, T. 49 N., R. 9 W., Ashland land district, Wisconsin, on appeal by Herbert from your office decision of May 27, 1892, holding for cancellation his homestead declaratory statement No. 80, covering this land, and directing that contestant's homestead application be placed of record *nunc pro tunc*, as of the date when offered.

This land is part of that forfeited and restored to the public domain by the act of Congress approved September 29, 1890 (26 Stat., 496).

Under instructions issued by your office these lands were not opened to entry until February 23, 1891.

On that day Herbert filed homestead declaratory statement for this land.

On March 2, 1891, Lachapelle filed an affidavit of contest against said filing, alleging that he settled upon this land in June, 1888, and has since continuously resided thereon; that he tendered a homestead application for this land on February 23, 1891, which was rejected for conflict with the homestead declaratory statement by Herbert; that he (Lachapelle) is entitled to a preferred right of entry under the act of forfeiture, and that Herbert has not resided upon said land and "has no rights therein as against this contestant."

Upon said affidavit hearing was had, resulting in the decision of the local officers adverse to Lachapelle, they finding that he was not entitled to a preferred right of entry.

On appeal your office held, as before set forth, viz., that the homestead declaratory statement by Herbert should be canceled and that contestant's homestead should be placed of record as of the date when offered.

It is a fundamental principle that a homestead declaratory statement is not an appropriation of the land covered by it, and will not bar entry by another.

Lachapelle, if he applied as alleged on February 23, 1891, should have appealed from the rejection of his application and thus protected his rights in the premises under such application.

Instead of appealing he initiated the present contest, for which there is no authority under the rules or the decisions of this Department.

I deem it unnecessary therefore to review the record made to determine whether he had such a claim to this land on September 29, 1890, as would entitle him to a preferred right of entry.

Your attention is called to the entry papers of Lizzie Fiebeg of this tract, which are returned to your office for appropriate action.

The contest of Lachapelle having been improperly allowed must be dismissed. Herbert's filing is no bar to the allowance of an entry by Lachapelle should he again apply, and, as it does not appear that Herbert followed up his prior right (if such he gained by his filing), by making entry within six months, all rights thereunder, in the presence of an adverse claim, would seem to be at an end.

OKLAHOMA LANDS—SETTLEMENT.

STANDLEY *v.* JONES (ON REVIEW).

Presence within the territory during the prohibited period, in violation of the statute and the proclamation of the President, disqualifies a claimant for lands in Oklahoma.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 5, 1894. (W. M. W.)

This is a motion for review of the departmental decision, dated March 3, 1893 (16 L. D., 253), filed on behalf of Moses M. Standley, in the case of said Standley *v.* George W. Jones, involving the SW. $\frac{1}{4}$ of Sec. 17, T. 15 N., R. 3 W., Guthrie land district, Oklahoma.

There are three other cases pending before me on review that involve the same question as the one at bar, all of which should apparently be decided in the same way, to wit: Cornforth *v.* Huff, Morgan *v.* Porter and Coombs, and Hostutler *v.* Cohee. The question is whether the respective parties were disqualified from making entry of land in the Territory of Oklahoma by the act of March 2, 1889 (25 Stat., 1004), and the proclamation of the President issued pursuant thereto. Jones made homestead entry for the tract April 30, 1889, and on the 7th day of May following Standley filed his affidavit of contest against it, charging Jones' disqualification under the statute and proclamation aforesaid; a hearing was had thereon. The local officers and your office sustained the contest. On appeal to the Department, the case was

reversed, and the contest dismissed. The motion for review asks to have the departmental decision set aside, and Jones' entry canceled. It is conceded that Jones and the other persons named were in the Territory immediately prior to April 22, 1889; that they entered it by permission for the purpose of hauling lumber to be used in constructing a building to be used as a United States land office at Kingfisher. The testimony shows, without contradiction, that on Sunday morning, the 21st of April, 1889, they started from Kingfisher to go outside of the Territory, with a view to re-entering it for the purpose of securing land. In order to get outside of the Territory at the point they started for, Jones and the other persons would have to travel about sixty miles. When they had proceeded on their way about twenty-four miles, one of the horses belonging to Jones got sick; thereupon, the original intention of going out of the territory in the direction they started, was abandoned, and upon consultation, it was determined to leave their wagons and extra horses, take each a horse, and go out of the Territory at the west side which was little over half as far as the north line. They then took their wagons and horses a short distance away from the road, where they left their wagons in the head of a draw. They picketed their horses (other than those they intended to ride) and left them and their wagons there. They then each one of them saddled a horse and rode to the west line of the Territory, "following the trail towards Kingfisher for some distance, when they bore south of west and crossed the line from five to seven miles south of Kingfisher. They camped here at about noon the next day," when they started in the race. "They travelled east and passed near the wagons, when two of the five stopped, hitched up the horses and brought the wagons. Jones and two others rode ahead to 'pick' good sites; Jones selected the tract in controversy, the others selected tracts in the vicinity. At night Jones and Hostutler took a wagon to Guthrie, and got Jones' wagon bed and the 'stuff' left there, also a trunk Hostutler and Huff had some goods in."

While there is other testimony tending to show that Jones and the other parties named did not go outside of the Territory, as claimed by them, but remained within it after their first entry; yet, for the purpose of this case, I prefer to rest my conclusion upon the testimony submitted by Jones. From such testimony, I am convinced that Jones violated the letter and spirit of the law, by reason of his presence within the Territory during the prohibited period, and he is clearly disqualified under the statute and proclamation of the President from making entry of the land in question. The motion for review is therefore sustained.

The departmental decision rendered on the 3d day of March, 1893, in this case, is hereby set aside, and your office decision of March 11, 1892, holding for cancellation Jones' homestead entry for the tract involved is hereby affirmed.

INDIAN LANDS—LEASE OF ALLOTTED LANDS.

OPINION.

Under the provisions of section 3, act of February 28, 1891, an allottee may lease the lands covered by his allotment, under such regulations as may be prescribed by the Secretary of the Interior, whenever by reason of age or other personal disability he cannot occupy or improve said lands with benefit to himself.

Assistant Attorney General Hall, to the Secretary of the Interior, April 10, 1894. (J. I. P.)

On January 25, 1894, there was referred to me by the Acting Secretary, a letter dated January 12, 1894, addressed to you by the Commissioner of Indian Affairs, recommending the approval of a number of leases of Indian lands in the Omaha reservation, Nebraska.

The reference was made with the request that I give an opinion as to whether under the law the leases mentioned can be approved. In compliance with that request, I submit the following:

The lands embraced in all save six of said leases were allotted in severalty to divers of the Omaha Indians, under the general allotment act of February 8, 1887 (24 Stat., 388), the six exceptions being allotments on the Winnebago reservation.

The leases on their face purport to be executed under the act of February 28, 1891 (26 Stat., 794), which is amendatory of the act of February 8, 1887, *supra*.

Section 3 of the act of February 28, 1891, provides as follows—

That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act, or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming and grazing, or ten years for mining purposes.

The proviso to said section having reference to a different class of lands, is omitted from the above quotation.

The question submitted involves a construction of the section quoted, and is of importance not only because of the leases submitted, but of those dependent on the conclusion reached.

The section quoted is remedial in character, and should be liberally construed, and that construction will be assisted and the legislative intent very largely ascertained by a consideration of the mischief sought to be remedied by said section.

Prior to the passage of the act of 1891, *supra*, it had been held by Attorney-General Garland (Attorney-General's Ops., Vol. 19, p. 235, and Vol. 19, p. 499), that the power of the Department to lease, or to authorize or approve the leasing of Indian lands, which is here conferred, did not exist, and the same had been held by the Assistant

Attorney-General of this Department. (See Assistant Attorney-General's Ops., Vol. 6 p. 54, and Vol. 8, pp. 65 and 156.)

By sections 4 and 5 of the act of 1887, *supra*, the allottees themselves were prohibited from conveying their allotments during the trust period of twenty-five years, or of making any contract with reference thereto, and any such conveyance or contract is by the terms of said act made absolutely null and void. This prohibited the allottees from leasing.

This want of power on the part of the Department and inability on the part of the individual allottees to lease their allotments when from any disability they could not occupy them with benefit or profit, led to a condition of affairs that threatened to defeat the purpose of Congress in allotting these lands in severalty to the Indians, which was, to better their condition, by destroying their tribal relations and leading them from savagery to civilization.

That condition of affairs is described by the agent in charge of the Omaha and Winnebago agency, in his annual report of August 26, 1890 (found at p. 137, Rep. Com. Ind. Affairs for 1890), wherein he makes the following statement:

Of the allotted lands at least sixty per cent. belong to women, aged or infirm men, and minor children. The able-bodied men have all and more than they can cultivate in their own right. As the law now stands there is no legal way to derive any benefit or revenue from this large tract of land. It either lies idle or is illegally occupied; in the latter case the owners derive but a small per cent. of its true rental value. I would recommend that the law be so modified or amended that allotted lands of these Indians may, under proper restrictions, be leased, the leases to be subject to the consent and approval of the Commissioner or agent, and only then when by proper showing it is made to appear that it is impossible for the allottees to cultivate the land themselves, and the leases be made for the purpose of cultivation.

To illustrate the working of such a law: A boy is sent to one of the Eastern schools and will be absent for a number of years. He has of his own allotment forty to eighty acres and often is heir to as much more. During his absence this land will be idle, or be unlawfully used. In either case he will derive no benefit from his allotment, and on his return he will find it unimproved as he left it. On the other hands, if a legal and binding lease could be made for a term of years (in case of those going to school to expire the same time as the school course) the lands could be leased for from \$1 to \$2 per acre per annum with conditions for a certain amount of improvements in addition. On the young man's return from school he would find his land broken, improved, and ready for him to take hold and make an industrious and prosperous farmer. The accumulated revenue would be sufficient to supply him with team and farming tools or erect a house, and, in short, it would answer the question of "What are we to do with those returning from school?" Again, the women, aged and infirm males cannot to advantage use their land, and if judicious leases were made, it would in a large measure support them.

To confer upon the Department the power wanting, with reference to the leasing of said allotments, and to correct the conditions existing because of that want of power, as set forth in the agent's report, *supra*, was manifestly the reason for the passage of the section quoted. Here, then we have the reason for the rule and the mischief sought to be remedied.

Referring to the language of that section, in the light of what is above stated, and from the relation of the terms employed, it is evident that the *disability* which must exist to authorize the leasing, is a *personal* one. That whenever any allottee, by reason of age or other *personal* disability, cannot occupy or improve his allotment with benefit to himself his allotment may be leased on such terms, regulations, etc., as the Secretary may prescribe.

It is also evident, in view of the reason for which the section quoted was passed, that the disability therein mentioned, as herein defined, extends to aged and infirm allottees of both sexes, and to women and minor children because they come clearly within the mischief sought to be remedied, as above set forth. (Sutherland on Stat., Const. Sec. 348; Id., Sec. 410.)

It is likewise manifest that the power by said section conferred is but an extension or enlargement of the supervisory power of the Secretary, and that the control of the whole matter is submitted to his discretion.

There are fifty-six of these leases. In thirty-six of them the lessor is the allottee; in sixteen, the natural guardian of a minor allottee; in twelve, the sole heir of an allottee; and in one, the executor of an allottee. One of the first mentioned class was executed by the attorney in fact of an allottee.

They are of the form heretofore approved by the Secretary of the Interior, and contain the terms, conditions and regulations prescribed by him for the leasing of allotments, and it seems to me that the interests of the allottees are thereby amply protected.

At the bottom of each lease there is a number in red ink to which, for identification, reference will be made.

A summary of the disabilities alleged by the various allottees, because of which they are prevented from "personally and with benefit to themselves occupying or improving their allotments," is as follows—

Nos. 39, 44, 123, 137, 165, 254, 22, 25, 47 and 53,—“occupying or cultivating other land;” in some instances that of a near relative or minor child. It is not shown, however, that he might not, with equal benefit to himself, occupy or cultivate his own allotment, or that he is precluded from so doing by a personal disability such as the statute defines.

Nos. 184, 252, 241, 93, 94, 145, 87, 85, 82, 197, and 251, “being a woman.” Ordinarily her sex would not of itself be regarded as such a personal disability as would bring an Indian woman within the purview of the section quoted. But by reference to the extract of the report of the Indian agent, it will be observed that “*women*, aged and infirm males, and minor children” are those who it is declared “cannot to advantage use their lands.” Hence it is fair to presume that in the section quoted Congress recognized the sex of the Indian woman as a personal disability, to the extent that it precludes her from “occupying

and cultivating her allotment with benefit to herself," and brings her within the mischief to be remedied.

Nos. 103, 42, 17, 31, 27 and 23,—“allottee's husband is working other lands.” This implies two things. First, that the husband is working all the land he is able to cultivate; and second, that the allottee, because of her sex and marital relations, is unable to occupy and cultivate her allotment with benefit to herself; either of which is sufficient for reasons stated.

Nos. 30 and 31 aver—“the land is low and wet,” and in the latter number the additional averment—“only fit for hay.” No reference whatever is made to any disability on the part of the allottee, or that for any reason he is unable to occupy or improve his lands with benefit to himself.

No. 45, executed by the executor of an allottee, declares that the “executor is working sixty acres of other lands,” and hence cannot attend to this allotment. Surely no argument is needed to show that this lease does not come within the provisions of the section under consideration. In the first place, there is no disability; and in the second place, if there were, it does not exist in the allottee.

No. 250 declares that the “allottee is working part of his land;” this implies that he can attend to no more. The law required impossibilities of no man, and I am of the opinion that this lease, and Nos. 63, 62, 61, 67, 242 and 251, which aver age, sickness and physical disability, bring them fairly within the provisions of the statute.

Nos. 2, 16, 18, 19, 20, 29, 40, 41, 43, 83, 96, 117, 159, 185, 241, and 261, are each executed by the natural guardian of a minor allottee. These allottees are of that class who can not, *with benefit to themselves*, occupy and improve their allotments, and hence come within the rule of the section quoted. But these leases present the question of whether a natural guardian can act as the lessor of a minor's allotment.

The provisions of the section quoted, concerning the land that may be leased, are very broad. It is not stated that the “allotment” of any particular class of allottees “may be leased,” but of “any allottee” having the required disability. Here the Indian's untutored condition is recognized. The power to lease is not conferred in terms on him. The language of the section is, “the same may be leased” and the supervision and control of the whole matter is placed in the hands of the Secretary. The ability or inability of the allottee, under State laws, to contract has nothing to do with the question. He cannot evade the supervisory power of the Secretary over these lands.

So far as the allottees of these lands are concerned, they are still “the wards of the nation,” and the Secretary of the Interior is the officer charged by law with the duties of guardianship (19 Op. Atty-Genl., 165). And the method by which the benefit contemplated by the section quoted may be best secured to the allottee is left entirely

to the discretion of the Secretary, and becomes rather a question of administration than of law.

Hence, if he believes that benefit can be best secured by allowing the natural guardian of a minor allottee, or the attorney in fact of the allottee, to become the lessor of that individual's allotment, he has ample power under the broad provisions of Sec. 3, *supra*, to allow it to be done, under such rules, regulations and restrictions he may see fit to impose.

As stated, in twelve of these leases the lessor is the sole heir of the allottee, and the disabilities therein alleged are as follows:—

Nos. 53, 161, 248 and 187—"being a woman."

Nos. 194 and 195—"being a widow."

Nos. 49 and 24—"occupying and cultivating other land;" the "other land" in the latter number being his own allotment.

No. 21—"being a widow and no one to work for her."

No. 46—"cultivating and occupying forty acres of this allotment, which is all he can tend."

Nos. 68 and 106—"being a cripple."

These leases present the question of whether the sole heir of an allottee can avail himself of the provisions of the section quoted, so far as his ancestor's allotment is concerned. All through the acts of 1887 and 1891, *supra*, it is apparent that Congress intended these allotments to inure to the sole use and benefit of the Indian and his heirs. If the provision of the section quoted is restricted to the allottee and his own allotment as made, then the incongruity would be frequently presented of an heir, himself an allottee, being permitted to lease his own allotment, but restrained from leasing the allotment inherited. Such a conclusion or construction would, I think, be a *reductio ad absurdum*. Besides, an heir, himself an allottee, is none the less so, because the inheritor of his ancestor's allotment, and it seems to me that a reasonable construction of the section quoted is, that when an allottee is prevented by age or other disability from personally cultivating his allotment, with benefit to himself, it means not only the allotment set apart to him by the agent appointed for that purpose, but his allotment by descent as well, and that any other construction would do violence to the general purpose of the act.

I am of the opinion that all of the leases submitted that are executed by sole heirs allege a disability that brings them within the purview of the sections quoted, for the reasons hereinbefore stated.

With the exception, therefore, of Nos. 39, 44, 123, 137, 165, 251, 22, 25, 47, 53, 30, 31 and 45, I am of the opinion that all of the leases submitted, for the reasons stated may be approved.

A number of them disclose certain informalities or irregularities in their execution, such as the absence of witnesses to the signature of the sureties on the bonds, and the absence in several instances of the required certificate showing the authority of the notary before whom

the acknowledgments were taken. With the correction of these informalities, wherever they occur, I am of the opinion that the leases indicated may be approved.

Approved,

HOKE SMITH,
Secretary.

RAILROAD LANDS—ACT OF MARCH 3, 1887.

MCCORD *v.* ROWLEY ET AL.

Settlement upon, and entry of lands covered by an existing railroad indemnity withdrawal will not operate to defeat the right of a prior purchaser from the railroad company to perfect title under section 5, act of March 3, 1887.

Secretary Smith to the Commissioner of the General Land Office, June 9, (J. I. H.) 1894.

I have considered the appeal of Warren E. McCord from the decision of your office dated March 19, 1889, rejecting his application to purchase the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 25, T. 40 N., R. 7 W., Eau Claire, Wisconsin.

The record shows that the land is within the indemnity limits of the grant to the Bayfield Branch of the St. Croix and Lake Superior Railroad company, now the Chicago, St. Paul, Minneapolis and Omaha Railway company (11 Stat., 20; 13 Stat., 66).

The records of your office show that all the odd numbered sections within fifteen miles of the line of said railroad were withdrawn, on May 29th, 1856, and all the odd numbered sections within twenty miles were withdrawn on February 5, 1866, and continued in reservation for the benefit of said road up to November 2, 1891. *Shire et al. v. Chicago, St. Paul, Minneapolis and Omaha Railway Co.* (10 L. D., 85.)

The tracts in question are opposite to the constructed part of said railroad.

On July 14, 1884, the railroad company sold and conveyed all the land now in question to Warren E. McCord. Upon the final adjustment of the grant to this road, it was found that the tracts, theretofore claimed by it and sold to McCord, were not necessary to make up the full measure called for by the terms of its grant; these tracts were therefore not included in the approved lists to said company for patenting.

Thereupon, and on June 6, 1888, McCord filed in the local office, his application to purchase said tracts under section five of the act of March 3, 1887 (24 Stat., 556), tendering at the same time to the receiver \$400, being \$1.25 per acre for said land.

The record shows that on the 10th day of February, 1888, and before McCord applied to purchase under the act cited, James and Bernard

Rowley were allowed to make homestead entries for all of this land, notwithstanding the fact that it was withdrawn from settlement or disposition.

The application of McCord to purchase was rejected by the register and receiver on June 22, 1888, because of conflict with the prior entries of Rowley and Rowley. On appeal, the ruling of the local land officers was affirmed by your office.

McCord has now appealed from said ruling to this Department. Section five of the act of March 3, 1887, *supra*, under which he claims the right to purchase is as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

The second proviso to said section has been held to apply only to the case of lands which at the date of the passage of the act had been settled upon after December 1, 1882, by parties claiming in good faith a right to enter the same under the settlement laws in ignorance of the rights or equities of others in the premises. *Chicago, St. Paul, Minneapolis and Omaha Railway company* (11 L. D., 607).

In the case at bar it is not claimed that either of the Rowleys made any settlement before February 10, 1888, a time long after the passage of the act cited, and long after McCord had purchased the tracts from the railroad company.

I am of the opinion that neither of the settlements of the Rowleys was such as would prevent McCord's purchase. The tracts were reserved from settlement at the time the entries were made. This being so, it follows that the Rowleys, neither claiming settlement prior to said withdrawals nor that the withdrawals were in-operative by reason of prior settlements, could acquire no rights, legal or equitable, thereby as against McCord or any body else. *Shire et al. v. Chicago, St. Paul, Minneapolis and Omaha Railway company* (10 L. D., 85).

It was held by the supreme court in the case of *Riley v. Wells*, speaking of settlement and entry upon a tract withdrawn by executive order,

that the settlement thereon was "without right, and the possession was continued without right, the permission of the register to prove up the possession and improvements, and to make entry under the pre-emption laws were acts in violation of law and void, as was also the issuing of the patents." This case, though not reported, is referred to and approved in *Wolsey v. Chapman* (101 U. S., 755), and is reported at length, in the *Lawyers' Edition*, Vol. 19, page 648.

The entries made by the Rowleys were erroneously allowed; not only that, but the land not being subject to entry, all acts relative to said entries were unauthorized; the entries themselves being unauthorized will not prevent McCord from purchasing the tract under section five of the adjustment act, provided he has complied with the instructions given to govern such purchases. See Circular (S L. D., 348-351). *Samuel L. Campbell* (12 L. D., 247).

The application of McCord should be allowed.

Your office decision is accordingly reversed.

SETTLEMENT—CONTESTANT—FINAL PROOF.

M McNAMARA v. ORR ET AL.

The right of a contestant to settle on the land involved in the controversy dates from the time when his right of entry is recognized, and his failure to reside on said land prior to such time can not be set up by an intervening applicant.

The acceptance of an application to enter subject to the preferred right of a successful contestant does not vest in such entryman any right as against the contestant, but protects him against the intervening applications of other parties.

Under the practice following the amendment of rule 53 of Practice final proof submitted during the pendency of a contest may be accepted though offered prior to the adoption of the amended rule.

The failure of a settler to reside on his land, after the submission of final proof, can not be construed as an abandonment of the land if his final proof is found sufficient.

A timber culture entryman who makes entry of a tract involved in a pending controversy can not thereafter be heard to plead the pendency of said contest as an excuse for non-compliance with law.

Secretary Smith to the Commissioner of the General Land Office, April
(J. I. H.) 5, 1894. (P. J. C.)

The land involved in this appeal is the SW. $\frac{1}{4}$ of Sec. 35, T. 154, R. 64 W., Devil's Lake, North Dakota, land district.

In order to intelligently understand the various complications that appear in the record of this controversy, and the numerous questions involved, it is necessary to give a detailed account of the connection the various parties have had with it.

It appears that on April 30, 1883, the land in question, together with other lands, was located by Sioux half-breed scrip; that on August 1, following, George H. Stoker offered his application to make timber cul-

ture entry of the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section, which was rejected because of the scrip location. On January 16, 1884, Emmett Orr presented his homestead application for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section, which was also rejected for the same reason.

It is stated in the opinions in the files that both these parties brought contest proceedings against the scrip location, and a hearing was had thereon, which, on March 7, 1888, resulted in a judgment by your office of cancellation of the scrip entries. On March 12, following, Patrick McNamara presented his homestead application for the entire SW. $\frac{1}{4}$ of said section, alleging settlement June 2, 1884. This application was also rejected for the same reason that the others were. Appeal was taken from the decision of the local office in the Orr-Stoker cases, and finally decided by the Department February 18, 1889 (173 L. and R., 211), under the title of John F. McGee *et al.* v. Henry F. Ortley *et al.* This decision declared the scrip locations invalid, and it was ordered that the several applications, "together with that of Patrick McNamara," be "returned to your office with the other papers in the case for appropriate action." On February 28, following, your office promulgated said decision, and returned to the local office the applications, with instructions that they "be allowed as of date when offered."

Orr and Stoker, therefore, on March 6, 1889, completed their entries. On the same day, at a later hour, McNamara offered his rejected application, when it was again refused for conflict with the former entries. McNamara again appealed, and also filed affidavits of contest. In the meantime, however, a motion for review of said departmental decision in the case of McGee *et al.* v. Ortley *et al.* was filed, and, following the Secretary's instructions, your office directed the local office "to suspend all proceedings in the case." On September 20, 1889, and while the motion for review was pending, Orr offered commutation proof on his homestead entry over McNamara's protest. The proof was endorsed, "Purchase price tendered by claimant and refused pending application for review in the case of McGee *et al.* v. Ortley *et al.* Letter H, April 24, 1889."

The motion for review was denied January 28, 1891 (213 L. and R., 452). On March 16, 1891, McNamara filed another affidavit of contest against Orr and Stoker, which, eliminating the historical part, alleges that he tendered his homestead application March 12, 1888, and the same day it was rejected; that Orr has abandoned the land; that he has not resided thereon since October 1, 1889, and does not reside in the county or State; that Stoker has not plowed any portion of the land included in his timber culture entry.

Hearing was had before the local officers, and as a result they recommended the dismissal of the contest as against Orr's entry, and that his final proof be accepted as of the date it was made; that the timber culture entry of Stoker be canceled, and the homestead entry of

McNamara for the tract claimed by Stoker be accepted. The two latter appealed, and your office, by letter of May 28, 1892, affirmed their action, as to Orr's entry, and reversed them as to Stoker's. A motion for review was filed, and on October 22, 1892, the former decision was revoked, the entries of both Orr and Stoker held for cancellation, and the application of McNamara allowed.

Orr and Stoker appealed. Their assignments of error are quite numerous, but amount substantially to the charge that your said office decision on the motion for review is against the law and the evidence.

It may be said at the outset that both Orr and Stoker earned a preference right to enter this land by reason of their contests against the scrip locations (*McGee et al. v. Ortleby et al.*, 14 L. D., 523). Their connection with the land, either as to residence or cultivation, pending their contests against the scribees, is immaterial, because their legal rights to enter upon and occupy the tracts claimed dated only from the time of the allowance of their entries. Hence it is not necessary to determine whether Orr settled on the tract claimed by him prior to McNamara, the point to which most of the testimony is directed.

It was error in the local office to reject the homestead application of McNamara, presented March 12, 1888. The proper course would have been to have received it for filing, subject to the preference rights of Orr and Stoker, under the ruling in the case of Henry Gauger (10 L. D., 221). But is this such an error as worked any injustice to this contestant? I take it that one purpose of this rule was to have the record show any claim that might be adverse to the right of either the contestant or the contestee in the action pending at the time of the application, and for the additional purpose of insuring notice to the applicant of any action taken in the premises by the local office, with the end in view that he might speedily be enabled to institute such proceedings as he saw fit to protect his rights. I do not understand that the fact of the presentation of his application and its reception under the rule had the effect of in any wise defeating the right of the successful contestant to make entry of the land. It does not have the effect of vesting in him any right against the successful contestant, but would protect him against any attempt of third parties to secure the land.

It is pertinent to inquire, therefore, whether McNamara was in any wise prejudiced by the rejection of his application to enter. The final decision of the Department cancelling the scrip locations was rendered January 28, 1891. Notice of this decision was received at the local office March 14, following, and on the 16th McNamara filed the affidavit of contest now under consideration. It will thus be seen that whatever rights he would have been entitled to, even if his application had been received, he obtained. So that I do not see that the erroneous rejection of his application to enter has in any wise jeopardized his interests. The only right he could have had as against Orr and Stoker was the right to contest their entries. This he has done, and as speed-

ily as possible. They had the preference right of entry; had exercised it; and this contestant is in the same position exactly as he would have been under the most favorable circumstances. Moreover, I apprehend that in any event a party could not be heard to object to the refusal of his application to enter the land, while a contest was pending to which he was not a party, where the successful contestant exercises his preference right. I do not think it was ever the intention of the Department to hold that the applicant should gain any standing by reason of his application alone, that would militate against the statutory right of the successful contestant. In the further consideration of the case, therefore, McNamara will be treated simply as a contestant.

First, as to the Orr case:

A strict construction of the charge against Orr in the affidavit of contest, would be that he abandoned the land after making his final proof. This, if all the surroundings were regular, and the law had been complied with, would not be a cause for contest, as the entryman may do as he chooses in regard to residence—at least, after final proof and certificate. But the final proof was not accepted, and certificate did not issue; hence I take it that the Department may inquire into all the facts, whether formally pleaded or not.

It will be remembered that Orr's entry was allowed under directions from your office, on March 6, 1889. It will be conceded that he established his residence on the land about that time; that he constructed a house thereon; that he lived there until September 20 or 22, 1889, when he left the land and the State, and did not return until the time of the hearing, which was in May, 1891. His house was a three room frame structure, worth about \$100, and his other improvements consisted of three wells, worth about \$15. They were bored, and the reason for sinking so many was because in the first two he did not get water. He also claims about fifteen acres of breaking. At the time he established his residence on the land in March, 1889, he was a single man, but in June following he was married. His wife did not reside on the land. On his examination he says, "She never resided with me on the land at this time, or never resided with me at all until after the 28th of September, 1889, as three days after we were married in June she left for her parents' home." "Our marriage was a secret, and she refused to live with me until I could arrange a house better." In his final proof, on this point, he says:—

My wife never lived on the claim; refuses to live on it, and has gone to Minnesota with her parents. She never lived with me since I was married. I am going to make an effort to induce her to live on this land with me at an early day, and intend enlarging and improving my house for her comfortable occupation.

The testimony further shows that since leaving the land he has resided in Kentucky, Wyoming and Minnesota.

It is insisted by counsel that Orr's entry, made as it was before the time for filing a motion for review had expired, was illegal; that his

final proof submitted while the motion for review was pending, and in violation of the Secretary's order to suspend all proceedings, was also illegal. It is further contended that the final proof is insufficient on its face, and that it should be carefully scrutinized, in view of the fact that it was submitted within the shortest possible time after entry, and the land immediately abandoned thereafter.

Granting, for the sake of argument, that your office erred in directing the local office to receive the application of Orr, yet it was not such an error as the contestant can take advantage of, especially in view of the fact that by the decision on the motion for review Orr's preference right was finally established. The fact that he had exercised it, and by order of your office, could in no wise affect the standing of the contestant in this case, whose only right, as heretofore stated, is that of contestant.

A more serious question, however, is presented by the act of Orr in offering his final proof at a time when all proceedings had, by order of the Secretary, been suspended. It will be presumed that he had notice of this order, and it will be conceded that the order was a proper one, under the circumstances. Even if the order had not been issued, the simple filing of the motion for review acted as a supersedeas, and maintained the status quo, both as to the land and the claimants (*Richards v. McKenzie*, 12 L. D., 47). The claimant, in the face of this fact, made his final proof, and the question is, whether or not this can be received.

I do not think, under the circumstances of Orr's marriage subsequent to establishing his residence on the land, the fact that his wife did not reside there with him, invalidated his residence thereon. He had established his residence in good faith prior to that event, and maintained it afterwards. His wife was out of the State, living with her parents, and it can not be claimed that he was making his home with her.

It is true that at the time his proof was made the rules forbid the making of final proof while the land was under contest. But by amended rule 53 (Rules of Practice, page 21 of edition of 1893), it is provided that proof may be submitted where proper notice is given, and held at the local office pending the controversy regarding the land, and the practice of the Department has been, since the amendment of the rule, where the proof is satisfactory, to approve it, notwithstanding its irregularity (*Akers v. Rund*, 16 L. D., 56; *Smith v. Chapin*, 14 L. D., 411).

It therefore follows, if the final proof is sufficient, that it is immaterial what course the entryman takes after it is submitted, in regard to residing thereon, and if he elects to abide elsewhere, that can not be construed into an abandonment of the land (*Peter Gaughran*, 6 L. D., 224). I am therefore of the opinion that Orr's final proof should be accepted. Before making final entry, however, he must make the non-alienation affidavit required by amended rule 53, *supra*.

As to the Stoker case:

The charge against him is failure to cultivate the land after his entry of March 12, 1889. The following agreed statement of facts was filed in this case—

It is stipulated by and between attorneys for Patrick McNamara, contestant, and George H. Stoker, contestee, that said Stoker had six acres of breaking done on the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 35, T. 154, R. 64, during the month of September, 1889, and that no further breaking on said land or cultivation of said breaking done in September, 1889, has been made from that date down to the present time. That no other improvements in compliance with timber culture law has been made on said land by said Stoker, except said six acres of breaking.

It will be seen that Stoker, during the first year of his entry, complied with the law by having six acres of land broken. During the second year he did not cultivate this land, and two months of the third year had expired when the stipulation was filed, and nothing had been done toward complying with the requirements of the law.

It was held in the case of *Sims et al. v. Busse*, (14 L. D., 429 syllabus,) that "a timber culture entryman who is regularly allowed to enter land involved in a pending contest, is required to comply with the law during the pendency of such contest," and therein is overruled the case of *Jones v. Kennett* (6 L. D., 688), where the reverse of the principle announced in the *Sims* case had been promulgated.

It is insisted by counsel that inasmuch as Stoker relied on the rule in *Jones v. Kennett* that the later doctrine in the *Sims* case should not control. It is also insisted that there is a distinction between that case and the one at bar, in this: That Busse voluntarily made his entry, and should therefore assume all the obligations incident to it; whereas, here, the entry, at the time it was made, was thrust upon Stoker by the order of your office, and was manifestly irregular, and that his obligations should date from the time of the final judgment of cancellation, January 28, 1891.

I do not think these positions tenable. Stoker evidently knew or recognized his responsibility by doing the work he did the first year. He was personally present in the local office when he made his entry, and it is not too much to assume that he voluntarily made it—as did Busse—and I think he should be held to his duty in complying with the law. I think that under the doctrine of the *Sims-Busse* case, *supra*, the contest should be sustained, as to Stoker's timber culture entry.

Your said office judgment of October 22, 1892, is therefore thus modified. Orr's final proof will be accepted, on compliance with the rules, and final certificate issue on payment of the required amount, and the contest dismissed as to him; the timber culture entry of Stoker will be canceled.

RAILROAD RIGHT OF WAY—CONSTRUCTED ROAD.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The right of way through certain Indian reservations granted by the special act of February 15, 1887, was secured on the approval of the maps showing the location of the road, and the construction thereof in due compliance with said act; and no further approval of said location is required by reason of the restoration of said lands to the public domain and their subsequent survey.

Maps of constructed road are approved only where maps of definite location have not theretofore been approved; and the map of constructed road, in such case, is treated as a map of definite location for purposes of approval.

The data on all maps of right of way should so determine the line of route involved, with reference to the public surveys, that the lines on the surface of the earth may be reproduced at any time if necessary for verification.

Secretary Smith to the Commissioner of the General Land Office, June 16, 1894.
(A. M.)

I have received your letter of the 7th instant enclosing maps of two sections of constructed road of the Saint Paul, Minneapolis and Manitoba Railway Company, covering distances of 9.60 miles and 158.03 miles, respectively, in Montana.

The company asks to have these maps approved under the special act of Congress approved February 15, 1887, 24 Stat., 402, on the ground that the townships involved were not subdivided at the date of the filing and approval of its maps of definite location of the road which has since been constructed.

It appears that the sections of road delineated on the maps run over lands that were at the date of completion of the line of road within the limits of certain Indian reservations but that are now public lands.

In view of this latter fact and of the additional fact that the lands have since been surveyed you express the opinion that maps covering the line of route involved should be approved, not under the special act as requested, but under the general right of way railroad act of March 3, 1875, 18 Stat., 482, for the protection of settlers.

You call attention to defects in the maps under consideration and recommend that they be returned to the company, to be resubmitted, when perfected as indicated, for approval as you suggest.

In answer I have to state that the special act of February 15, 1887, granted the company a right of way through these Indian reservations on compliance with the provisions thereof and authorized the Secretary of the Interior to approve its maps. The company availed itself of the privileges granted by the act, fulfilled its requirements, secured the approval of its maps of definite location and constructed its road within the legal limit and no further approval is required by reason of the subsequent survey.

Neither the special act nor the general act above referred to requires the approval of maps of constructed roads, and the regulations under

the general act, section 4, requires the filing of maps of constructed road for purposes of information only. Further the Department has never approved maps of constructed road, except in instances where maps of definite location had not theretofore been approved and the maps of constructed road were held, for the purpose of approval, to be maps of definite location as well.

Following this rule of action I decline to direct the return of the maps that they may be ultimately re-submitted for approval. As regards the defects noted against the maps I think it would be well for the complete information of your office to require of this and all other right of way railroad companies that the data on all maps filed by them shall so determine the line of route involved, with reference to the public surveys, that the lines on the surface of the earth may be reproduced at any time if necessary for verification.

Such requirement is clearly within the scope of the present regulations and accords with the action of the Department on February 2, 1892, in following the recommendation of your office and declining to approve a map filed by the Grand Island and Wyoming Central Railroad Company because it was not executed with sufficient exactness to permit of a determination of the location of the line of road.

The maps are returned herewith.

RAILROAD GRANT—JUDICIAL DISSOLUTION OF COMPANY.

HASTINGS AND DAKOTA RY. CO.

The failure of a railroad company to furnish a specification of losses as the basis for a list of indemnity selections cannot be excused on the ground that it was due to the erroneous advice of the local officers.

A departmental decision canceling railroad indemnity-selections takes effect as of the date of the decision, and the lands affected thereby are thereafter subject to selection by the first qualified applicant.

The judicial proceedings instituted by the State resulting in a decision that the Hastings and Dakota company by failure to maintain and operate its road had forfeited all rights and franchises under its charter, including its land grant, except as to lands already earned, will be accepted by the Department as final, and determinative of the rights of the company, under the laws of the State, in regard to matters properly passed upon.

The judicial dissolution of said company does not defeat the right of the stockholders to select and receive, through a trustee appointed for such purpose, indemnity for lost lands.

Under the provisions of the State law it was competent for the stockholders in said company, after the decree of dissolution, to execute a deed conveying all interest in its land grant to a trustee, for the purpose of closing up the affairs of said company and settling the claims of creditors and stockholders, and the power so conveyed survives the existence of the company.

Directions given for publication of notice advising settlers of the pendency of indemnity-selections and contemplated action thereon.

Secretary Smith to the Commissioner of the General Land Office, June 19,
(J. I. H.) 1894. (V. B.)

With letter of October 24, 1893, you submitted for my approval list No. 9 of lands, selected as indemnity for the benefit of the Hastings and Dakota Railway Company.

The list embraces 18,256.39 acres of land, situated in the Marshall land district, Minnesota; and in an explanatory letter accompanying the list, it is stated by you that every selected tract therein is clear upon the records of your office, and free from asserted claims of every kind, and that the lands specified as bases for said selections are within the primary limits of the grant for said road, but were excepted from the operation of the grant.

The lands in question were within the overlapping indemnity limits of the grants made March 3, 1857 (11 Stat., 195), and March 3, 1865 (3 Stat., 526), for the St. Paul, Minneapolis and Manitoba Railway Company, and July 4, 1866 (14 Stat., 87), for the Hastings and Dakota Railway Company. Both companies made selections within those limits, which selections were rejected by this Department October 23, 1891. (See 13 Land Decisions, 440.)

The order of withdrawal of the indemnity lands for said companies was revoked May 22, 1891 (see 12 L. D., 541); and, in the case cited in 13 L. D., a full history of the controversy between the two companies is given, their rights are determined, and the exact status of the lands involved is defined, it being held that they are subject to selection "by the company first presenting application therefor, in the manner prescribed by the regulations governing such selections."

It is stated in your said letter that the list of selections embracing these lands, and about 48,000 acres more, was filed in and accepted at the local office on October 29, 1891.

The selection of the other company having been canceled in pursuance of said decision, no controversy is raised by it in respect to the approval of the list now presented.

It appears, however, that on November 17, 1892, your predecessor, Commissioner Stone, for reasons stated, held for cancellation the entire list of selections, filed in the local office by the Hastings and Dakota Railway Company on October 29, 1891. But, on a motion for review, which was pending when you became Commissioner, on September 9, 1893, you revoked and set aside his decision, and, acting on your conclusions, have prepared and forwarded to me said list No. 9.

The selections heretofore made by the Hastings and Dakota Railway Company in 1883, were rejected, by the departmental decision of October 23, 1891, mainly because they were not accompanied by a designation of losses as bases therefor. In behalf of the company it is now insisted that this ruling ought not to be maintained, because at the time the lists were presented to the local officers, in 1883, they

were accompanied by proper designations of lost lands; but the local officers informed the agent of the company that, in view of the fact that the grant was largely deficient, it was not necessary that a list of losses should be filed. And it appears by affidavits filed that probably the company's officer was so advised by the register and receiver. But there was no authority in those officers to thus suspend the rules of the Department, which, since the circular of November 7, 1879, requires the designation of the specific tracts for which indemnity lands are selected. This rule has the force and efficacy of law, and the company, in accepting the advice of the local officers, as to the requirements of the law, did so at its peril.

The departmental decision having, in effect, rejected the selections of both companies, and declared the lands to be subject to entry by the first applicant, or to selection by either company first presenting proper application, it would seem that the clear selections of the Hastings and Dakota Railway Company, made October 29, 1891, being first in point of time, and accompanied by proper bases, are first in right, and ought to be approved, if there be no other sufficient reason to the contrary.

The point made by Commissioner Stone that, though the departmental decision was made on October 23, 1891, it did not become effective until the former selections, which covered said lands, were actually canceled on the records of the local office, which was some time in November, 1891, does not commend itself to me, but seems to be in entire discord with well settled rules and numerous decisions of this Department. Your predecessor states that though the decision was signed October 23, it was not promulgated until the 30th, was not received by him until November 2, and not mailed to the local office until November 21, 1891.

By a long line of decisions it is settled that cancellation takes effect as of the date when the decision is rendered, the entry of the order of cancellation on the records being a mere ministerial act of the officers, which, when made, takes effect by relation as of the date of the judgment. (*Pomeroy v. Wright*, 2 L. D., 164; *Anderson v. Northern Pacific R. R. Co.*, 7 L. D., 163; *Dahlstrom v. St. Paul, Minneapolis and Manitoba Ry. Co.*, 12 L. D., 59; *Coder v. Lotridge, Id.*, 643; *Lough v. Ogden*, 17 L. D., 171; *Perrott v. Connick*, 13 L. D., 598.) The judgment of cancellation in this case being rendered on October 23, the lands were properly subject to the selection made by the Hastings and Dakota Railway Company, on the 29th, or six days thereafter.

The Hastings and Dakota Railway Company was incorporated under the laws of Minnesota, for the purpose of building the railroad in question, and to aid in that purpose the congressional land grant before referred to was conferred upon it by the legislature of the State. The road was built, though not in the time required by the congressional grant, but no forfeiture of the grant has been declared by Congress

because of this failure to construct in time and consequently the donation of lands made by the grant was earned by that company.

Subsequently, and in 1872, the Hastings and Dakota Railway Company sold that portion of its road, between Hastings and Glencoe, to the Milwaukee and St. Paul Railway Company. Afterwards, in 1880, it sold and conveyed the balance of its road to the same company, under its new name of the Chicago, Milwaukee and St. Paul Railway Company. The sales included the rolling stock, equipments, etc., of the vendor company, reserving and excepting the land grant, and that company's franchise to be a corporation. Since the time of the sales the road has been operated entirely by the purchasing company.

Subsequently the State of Minnesota instituted *quo warranto* proceedings in the supreme court of that State to forfeit the charter of the Hastings and Dakota Railway Company, and a judgment of forfeiture was decreed by that tribunal on December 23, 1886. (*State v. Hastings and Dakota Ry. Co.*, 36 Minn. Rep., 246.)

In the opinion of the court declaring the forfeiture, it was said that the lawful business of the company, the end and object for which it was created, the consideration upon which its franchise and lands were given, were to maintain and operate a railroad; that a suspension of that business by the corporation was a sufficient ground for an absolute forfeiture of its entire corporate rights, notwithstanding the reservation of the land grant and its franchise as a corporation; the court holding that the right to acquire and dispose of said lands was ancillary and subordinate to the main purpose for which the company was chartered, and cannot survive the sale of the road and a suspension of its principal business, unless by sanction of the legislature of the State, expressed or clearly implied, which has not been given in this instance (p. 259).

The court further said, on page 263, "Undoubtedly the company acquired an absolute right to the lands actually earned as the construction of the road progressed," but the charter did not contemplate that this ownership should be severed from the proprietorship of the road, and the survival of the company as a separate organization, entitled to exercise the separate franchise of holding and disposing of its lands.

It results from this decision that, under the laws of Minnesota, the Hastings and Dakota Railway Company, by failure to maintain and operate its railroad, forfeited all the rights and franchises conferred by its charter, including the congressional land grant, except as to lands already earned by it. This decision of the highest judicial tribunal of the State of Minnesota will be accepted as final and determinative of the rights of the company under the laws of that State in regard to the matters properly passed upon.

By sections 416 and 417 of the general statutes of Minnesota, Vol. 1, p. 450, it is provided—

§ 416. (Sec. 167.) Continuance for three years for certain purposes. Corporations whose charters expire by their own limitation, or are annulled by forfeiture or other-

wise, shall, nevertheless, continue bodies corporate for the term of three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital stock; but not for the purpose of continuing the business for which they were established.

§ 417. (Sec. 166.) Appointment of receiver, etc., by district court. When the charter of a corporation expires or is annulled, or the corporation is dissolved as provided herein, the district court of the county in which such corporation carries on its business, or its principal place of business, on application of a creditor, stockholder or member, at any time within said three years, may appoint one or more persons receivers or trustees, to take charge of its estate and effects, and to collect the debts and property due and belonging to it, with power to prosecute and defend in the name of the corporation or otherwise, to appoint agents under them, and do all other acts which might be done by such corporation if in being, that are necessary to the final settlement of the unfinished business of the corporation. The powers of such receivers may be continued as long as the court deems necessary for said purposes.

It is apparent from the language of this act that upon the declaration of the forfeiture by the supreme court, the Hastings and Dakota Railway Company, as a corporation, did not cease to exist instantly, but continued its organization with its officers and stockholders, with all the authority possessed as such for the purpose of enabling it to "settle and close" its concerns, "to dispose of and convey" its property, and divide its capital stock, but not for the purpose of continuing the business for which it was created. In other words, with this exception, the life of the corporation is to continue, for three years after forfeiture, with all of its other powers. (*Hannan v. Sage*, 58 Fed. Rep., 651.)

No receiver was appointed under the provision of section 417, but within the three years thus allowed by section 416, and in pursuance of directions to that effect, contained in resolutions of the stockholders and board of directors of the Hastings and Dakota Railway Company, a deed was executed on December 9, 1889, by the Vice President and Secretary of said company to Mr. Russel Sage, as trustee for the stockholders, as follows—

This indenture witnesseth, that in consideration of the premises and of one dollar to it in hand paid by the party of the second part, the receipt of which is hereby acknowledged, and in order to divide its capital stock among its several stockholders and to secure the fair and proportionate distribution of the proceeds of its lands and other property among its shareholders in the proportion aforesaid, the party of the first part has granted, bargained, and sold, and by these presents does grant, bargain, and sell, convey, and transfer unto the party of the second part, his heirs, assigns, and successors in the trust, and powers in trust hereinafter declared, all and singular the following described lands ————, meaning and intending to convey, transfer, set over, and assign the entire land grant of said party of the first part hereinbefore referred to not heretofore disposed of, whether already certified to the State of Minnesota and deeded by it to the party of the first part or not, and all right to claim certificates and conveyances of any of said lands from the State or United States, and to prosecute any such claims before the Land Department of the United States, or any of its land offices; all of which is uncertified lands and the right to prosecute therefor for the consideration aforesaid, the party of the first part hereby sells, grants, transfers, assigns and sets over unto the party of the

second part, together with all actions or rights of action now pending in any court of any State, or of the United States, or in or before the Land Department of the United States, or any of its land offices, or which hereafter may be pending for the recovery of any of the lands embraced in said grant, or the value thereof, or damages for the detention of the same, any and all rights of action either in law or equity in regard to the same, to have and to hold subject to all outstanding contracts of said party of the first part in regard to the same to him, his heirs, executors, administrators, assigns, and successors, in trust as aforesaid.

Hereby granting and conferring on said party of the second part full power to prosecute or defend all actions or causes of actions or proceedings in regard to any of said lands in his name as trustee for the benefit of said trust, as fully as the party of the first part can or may do, and to sell and convey all lands which he may recover in any such proceedings, and distribute the proceeds of said sales, and all sums realized in said proceedings as hereinafter provided.

To have and to hold to the party of the second part, his heirs and assigns and successors in said trust forever, in trust, nevertheless, and with full power to sell and convey all and singular the land herein granted and conveyed, and distribute the proceeds thereof.

On October 26, 1891, the governor of Minnesota, under the seal of the State, appointed George E. Skinner agent thereof, for the purpose of making selection of lands accrued to the State under the land grant made to it by said act of Congress of 1866; and on October 29, 1891, the selections, on which said list No. 9 is based, were filed in the local office. Mr. Skinner was also the agent of Mr. Sage for the same purpose.

In a letter of your predecessor to this Department dated November 26, 1892, calling attention to the forfeiture of the charter of said company by the decree of the supreme court of Minnesota, it is said that the right of the company to assert a claim to indemnity lands, not previously selected, expired with its own existence, and could not be prolonged by the appointment of a trustee, and the conferring upon him of rights which the company itself could no longer exercise after the date when it ceased to have an existence; that the lands being prospectively donated only for the purpose of aiding in the construction of that particular road, and there being now no beneficiary upon which they can be conferred, indemnity selections should not be approved. In your letter of September 9, 1893, you dissent from the views of your predecessor in this respect.

If this position of your predecessor be correct, and there was no longer a beneficiary in existence after March 23, 1890, when the three years allowed by statute after forfeiture expired, then there was error in his submitting, and the Secretary approving, on February 18, 1892, the list embracing 26,441.23 acres for the benefit of the road, even though those lands were within the primary limits of the grant; for the non-existence of a beneficiary would necessarily be fatal, wherever the lands be situated. And it is utterly immaterial whether they were earned before or after dissolution. For if there be no one authorized to take them at the time of the certification, the act of the Department in that respect must be inoperative and an absolute nullity.

But I think your predecessor misapprehended the principles of law governing such a condition of affairs.

It is too well settled to be now seriously questioned that a judgment of forfeiture against a corporation reaches only its corporate franchises and extinguishes them. The property rights are not to be reached, and cannot be confiscated by the State, but are to be protected and administered according to the ordinary rules of equity. (*Bacon v. Robertson*, 18 How., 468, 473; *Morawetz on Private Corporations*, §1033.)

The effect of that dissolution is merely to destroy the legal existence of the corporation, which was the representative or trustee of the shareholders. With dissolution is lost all remedy at law; the rights of the stockholders, however, remain, though not capable of being asserted in courts of law. The decisions in England and this country are to the effect that there is a distinct and positive right of property in the individuals composing the corporation, in its capital and business, even while subject in the main to the management of the corporation. The dissolution of the corporation does not destroy these rights; but a court of equity will interfere effectively for their preservation. (*Bacon v. Robertson*, *supra*; *Meriwether v. Garrett*, 102 U. S., 472, 529; *Shields v. Ohio*, 92 U. S., 319, 324.) And to make this protection entirely effective, if there be no trustee the court will not hesitate to appoint one. (2 Story's Eq. Juris., §976, §1059, *et seq.*)

There can therefore be no force in the assertion that the dissolution of the Hastings and Dakota Railway Company destroyed any property rights growing out of the business of that company which its stockholders were properly entitled to.

That company was organized for the purpose of constructing, and was authorized to construct, a railroad from Hastings, on the eastern boundary of the State, to the western boundary thereof. The grant made by Congress to the State to aid in the construction of that road was conferred upon it by the State. The road has been built and operated for years. It was built with the money of the stockholders. The grant having been fully earned by the construction, the stockholders are entitled, in good conscience, to the full benefit thereof, and their just claims, in that respect, should not be defeated by technicalities or rigid construction. If the corporation had not been dissolved, there is no question but that, under the circumstances, it would have been entitled to select and receive under the grant indemnity for its lost lands. Can the stockholders, surviving that dissolution, be deprived of that right which the corporation, as their agent, could have consummated? Clearly, on principle and authority, I think not.

In the opinion of the court decreeing the dissolution of the corporation, it is said that "undoubtedly the company acquired an absolute right to the lands actually earned as the construction of the road progressed." When the fact that the company had earned the lands

donated by the grant was established, co-existent therewith arose and attached the right to select indemnity for lands lost to the grant by the exceptions thereto. (*Winona, etc., v. Barney*, 113 U. S., 626.) It is true that, while the title to the lands within the primary limits passed to the company upon the definite location of the line of road, the title to the indemnity lands does not pass and is not vested in the beneficiary until a selection is made, and that selection is approved by the Secretary of the Interior. (*Wisconsin v. Price*, 133 U. S., 496.) But the vesting of the title to particular lands is entirely different from the "right" to initiate proceedings which will ultimately ripen, by approval, into a perfect and complete title. This "right to select" is recognized in the *Kansas Pacific* case, 112 U. S., 421, and other decisions of that Court, as well as in many decisions of this Department; and in the *Cedar Rapids* case, 110 U. S., 39, it is said that this "right" accrues when the map of the entire line is filed; that is, the lands in place being then capable of identification, and the lost lands ascertainable, coincidently therewith the "right" to select arises and becomes fixed in the grantee company, though the title to the selected lands do not vest until after approval, if there be any to select.

Unquestionably it is a "right," and a valuable property right, such a right as might be sold or encumbered (*Myers v. Croft*, 13 Wall., 291), as has been frequently done by grantee companies, and would entitle the assignees to the indemnity lands when title thereto is perfected under the grant, in accordance with its directions. Such a right is, to my mind, as a *chose in action*, part of the assets of the corporation in question, and would be administered by a court of equity in the interest of the creditors and stockholders, the court appointing a trustee, if necessary, to secure possession and control of those assets.

In this instance a trustee has been appointed for the very purpose, so that there is no necessity for the action of a court in that respect.

It is said, however, that the appointment of this trustee was *ultra vires*; that there was no authority of law for his appointment in the way in which it was made.

This position, I do not think, is tenable. The appointment was made during the three years allowed the corporation within which to wind up its affairs. It had full power during that time to dispose of its property by deed of bargain and sale; and surely if it then had the power to sell absolutely the assets for the benefit of the creditors and stockholders, it would seem to be paradoxical to hold that the company was powerless to execute a deed conveying a lesser estate, an estate limited by a trust, to consummate the very purpose for which the company's existence was prolonged. It certainly cannot be, if all the assets are not collectable and distributable within the three years, that it was contemplated nothing thereafter was to be done to attain that end. Such a view leads to practical confiscation, which is abhorrent to our sense of justice. In the nature of things, many of these

assets could not be realized within the time named, and if no one could be empowered after that time to collect and distribute them, innocent creditors and stockholders would be deprived of their rights of property, without "due process of law;" a premium and immunity would be offered as inducements to the debtors and others to avail themselves of devices to delay payments to the company beyond the three years.

The execution of the deed in question by no means extended or attempted to extend the life of the corporation, or sought in any way to carry on the business of the company. On the contrary, its purpose was to close up the affairs of the company, to collect and dispose of its assets, and settle finally the claims of creditors and stockholders. The authority to execute such a deed clearly existed in the corporation at the time of the execution, and it is no way unreasonable to hold that the power conveyed survived the existence of the company.

On a careful examination of the whole subject, I concur in the conclusions reached by you, and think the selections ought not to be canceled for any of the objections made, but that said list should be approved, if there be no other reason to prevent.

With the papers before me, is an appeal, signed by Mr. John Lind, as attorney for unnamed "settlers," from your decision of September 9, 1893. As the lands in the list sent are certified by you to be vacant and unappropriated, and Mr. Lind does not assert claim to any of them on behalf of the unknown "settlers," his so-called appeal might have been dismissed for want of apparent interest. But, under the circumstances, I have considered the points made therein, and given them due consideration, as will be seen by the discussion thereof.

Since this matter has been pending here, a letter, dated April 3, 1894, has been received from the Governor of Minnesota, wherein it is stated that "no one at present, so far as I know, is authorized to act for the State of Minnesota in making indemnity selections for the so-called Hastings and Dakota land grant." This statement of the Governor cannot affect the selections herein, inasmuch as they were made, as before stated, under due authority from the governor of the State, existing at the date of selection.

There have also been forwarded relinquishments from Mr. Sage for two tracts of the land embraced in list No. 9, aggregating 215 acres, which it will be necessary to eliminate from said list. A claim has also been filed by Egan Anderson for, and alleging settlement, June 30, 1890, on the SW. $\frac{1}{4}$ of Sec. 13, T. 122, R. 44, which is likewise included in said list. Mr. C. W. Stanton has also filed claims in behalf of some fifty alleged settlers, whose names are given, and who claim to have been settlers on described tracts at the time of the selections by the Hastings and Dakota Railway Company now under consideration. The letter of Mr. Stanton was sent to you for report, and, in letter of April 17, 1894, you state that no copy of list No. 9 was retained in your office, but assert that at the time of forwarding the same there was no

claim of record or pending in your office for any tract of land described in said list.

This is hardly satisfactory, for a casual examination of the list presented by Mr. Stanton shows that, at least, some of the tracts claimed to have been occupied by settlers at the date of selection, are included in list No. 9.

Under these circumstances I do not think said list should be approved at this time. I therefore return it to you, for further action.

It is desirable that there should be as little delay as possible, consistent with a proper administration of the law, in closing the adjustment of this grant. To that end you will direct that public notice be given for at least thirty days in one or more newspapers having a general circulation in the vicinity of the selected lands of the Hastings and Dakota Railway Company, advising all settlers thereon of the selection and contemplated certification of the same; and that they are required to formally make at least a *prima facie* showing of any claimed rights by reason of their settlements, within the period of publication, or otherwise be thereafter treated as having waived any claims in that behalf. You will also cause Mr. Stanton to be notified hereof.

At the expiration of the thirty days' notice, you will eliminate the tracts in regard to which such showing has been made, if any, and transmit a clear list for my approval.

SECOND HOMESTEAD—OKLAHOMA LANDS.

HAINES *v.* SEESE.

A homestead declaratory statement filed and relinquished after the passage of the act of March 2, 1889, 25 Stat., 854, defeats the right to make a second entry under section 2 of said act, and is also a bar to a similar entry under section 13, act of March 2, 1889, 25 Stat., 980.

The acceptance of employment within the territory of Oklahoma in advance of the opening of the lands therein to settlement, and in anticipation thereof, disqualifies the applicant, though remaining outside of the territory during the prohibited period, where by the nature of the applicant's employment he obtains special information as to desirable tracts.

One who enters said territory during the prohibited period can not avoid the resulting disqualification by the plea that he "merely entered the territory on a pleasure trip."

Secretary Smith to the Commissioner of the General Land Office, June 18, (J. I. H.) 1894. (G. C. R.)

On April 22, 1892, James A. Seese made application for "restoration of right" and to be allowed to enter the SE $\frac{1}{4}$ of Sec. 13, T. 16 N., R. 9 W., Kingfisher, Oklahoma Territory. This application was rejected by the register and receiver, on the day of its presentation, because the applicant "was not qualified," he having been in the Cheyenne and Arapahoe country prior to April 19, 1892, and since March 2, 1889. His rejected application was transmitted to your office May 20, 1892.

On May 23, 1892, Arthur T. Haines filed his protest against Seese's application; he also applied to make homestead entry of the land. Haines's application was rejected because of the prior application of Seese, and he appealed.

Your office decision of November 25, 1892, affirmed the action of the register and receiver as to the rejection of Haines's application, and directed the allowance of Seese's application to enter the land.

From that judgment Haines has appealed to this Department.

Seese states in an affidavit accompanying his application that he is the identical person who filed soldier's declaratory statement No. 110, April 29, 1889, for the NW. $\frac{1}{4}$ of Sec. 21, T. 16 N., R. 7 W., Kingfisher, Oklahoma. He further states that through poverty he was unable to command the amount of money necessary to complete his entry within six months from filing his soldier's declaratory statement, and was compelled to abandon it.

It appears from your said office decision that Seese filed supplemental evidence. I am unable to find that evidence in the files of the case, but from a statement in said decision it appears that Seese, when called on by your office, stated that when he filed his soldier's declaratory statement there was another party who had settled on the land covered thereby, and who afterwards threatened to file a contest against him, and that through poverty he was unable to settle upon and improve the land, and unable to buy off and settle the contest, and was forced to relinquish his filing; that one James Drest arranged with him to relinquish, and to allow G. H. Hogan to file thereon; that said Drest paid \$152.50 as a consideration, but that he was compelled to pay the adverse claimant, before referred to, \$92.00 to compromise his claim, causing him to realize but \$57.50 out of the transaction; that he was an employe of the United States surveying corps, under the command of William Parker, and assisted in allotting lands to the Cheyenne and Arapahoe Indians; that he left the country the last of March, 1892, and remained out until twelve o'clock noon of April 19, 1892, when he went in on horseback with the others, and selected and settled upon the tract applied for, and that he did not select the land or gain any advantage by reason of having been employed therein.

It will be noticed that Seese filed his soldier's declaratory statement April 29, 1889, in T. 16 N., R. 7 W.; he relinquished his filing and the same was canceled, October 22, 1889, or seven days less than six months after the filing was made. It is manifest that he was then in no danger of losing his land from any claim of prior settlement by another, for such other person—had there been such—had forfeited all his alleged prior settlement rights by his failure either to enter the land or attack the soldier's declaratory statement by a contest within the time allowed by law (three months) from date of such alleged prior settlement. *Burrus v. Cantrel*, 15 L. D., 397.

It must therefore be held that Seese made a voluntary relinquishment of his soldier's declaratory statement; and this view is strengthened, almost to a demonstration of its accuracy, by the fact that he received a moneyed consideration for such relinquishment.

Section 2298 of the Revised Statutes allows but one homestead privilege, and under the general law a settler relinquishing or abandoning his claim can not thereafter make a second entry.

It is well settled that the right to make homestead entry is exhausted by the filing and abandonment of a soldier's homestead declaratory statement. Circular, December 15, 1882, 1 L. D., 648; *Stephens v. Ray*, 5 L. D., 133; *Richard T. Henning*, 9 L. D., 382; *Patrick O'Neal*, 8 L. D., 137; *Joseph M. Adair*, *Idem.*, 200; *Edson O. Parker*, *Idem.*, 547; *Maria C. Arter*, 7 L. D., 136.

The second section of the act of March 2, 1889 (25 Stat., 854), allows a second homestead entry when the person applying has not perfected title to a tract of land of which he had made entry. But this act does not apply where the original or first entry was made after its passage (*Lizzie Peyton*, 15 L. D., 548), and since Seese's soldier's declaratory statement was filed April 29, 1889, and since as above shown he had exhausted his homestead right, he was not entitled to a second entry, under the act of March 2, 1889 (*supra*).

The act of March 2, 1889 (25 Stat., 980, 1006), entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations," etc., provides, in its 13th section (p. 1005), for certain Indian lands to become part of the public domain; also "That any person who having attempted to, but for any reason failed to secure title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry of *said lands*."

This act, like the one of the same date (March 2, 1889, 25 Stat., 854), can not apply when the first entry was made after its passage.

The land Seese now seeks to enter is in that part of Oklahoma Territory which was opened to settlement April 19, 1892, by the proclamation of the President, dated April 12, 1892 (27 Stat., 1018), under the provisions of the act approved March 3, 1891 (26 Stat., 989, 1044). No provision is made in that act for a second homestead entry. It follows that he is not qualified to make entry of the lands.

The act of March 3, 1891 (*supra*), provides for certain allotments to be made to the Cheyenne and Arapahoe tribes of Indians, and the 5th section of the treaty (p. 1024) provides that in a certain contingency the allotting agent in charge of the work shall make the allotments. Seese was so employed; he alleges that he left that territory the last of March, 1892, and remained out until twelve o'clock, noon, of April 19, 1892, "when he went on horseback with others and settled upon the tract applied for." While he says he obtained no advantage by reason of his employment as one of the allotting agents, yet it is a fact that he

was in the territory just before the President's proclamation (April 12, 1892), opening those lands, and that proclamation says:

Notice, moreover, is hereby given that it is by law enacted that until said lands are opened to settlement by proclamation, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall be permitted to enter any of said lands or acquire any right thereto, and that the officers of the United States will be required to enforce this provision.

Being in the territory surveying the lands and making allotments, he certainly had an excellent opportunity for discovering the best tracts; anticipating the President's proclamation, he went out and did not return until the time fixed for entering upon the lands, when he at once rode to the tract. His presence on the land in the capacity of a surveyor prior to the opening was lawful; but such presence was in violation of both the letter and spirit of the law, if, when he was engaged in that work, he was also intending to enter some portion of the lands. By accepting such employment in advance of the opening and in anticipation thereof, he was enabled to find, and no doubt did find, where the best tracts were located, and was thus enabled to proceed directly to one of them on the appointed day. For this reason he was also disqualified. *Townsite of Kingfisher v. Wood*, 11 L. D., 330.

Arthur T. Haines, the protestant, is in no better condition. In his affidavit, accompanying his application to enter the land, he says:

I did not enter upon and occupy any portion of the lands described and declared open to entry in the President's proclamation, dated April 12, 1892, prior to 12 o'clock, noon, of April 19, 1892, except that affiant on two occasions went southwest of Kingfisher to an Indian camp—a distance of about three miles—and that he did not go into the territory for the purpose of securing any advantage or to ascertain the location of tracts most valuable for agriculture. Affiant merely entered said territory on a pleasure trip.

His "pleasure trips" were taken at the expense of his right to enter any of those lands. (See *Smith v. Townsend*, 148 U. S., 490; *Hawkins v. Covey*, 17 L. D., 175.)

The decision appealed from is reversed in so far as it allowed Seese to make entry of the land. The application of Haines will stand rejected for the reasons above given.

FOREST RESERVATION—SUCCESSFUL CONTESTANT.

HOSTRAWSER *v.* McSWAIN.

A contestant who successfully attacks an entry covering a tract of land embraced within the limits of a withdrawal for a public reservation, made after said entry was allowed, does not thereby secure a right that will exclude said tract from the operation of the order creating the reservation.

Secretary Smith to the Commissioner of the General Land Office, June 18,
(J. I. H.) 1894. (W. F. M.)

On November 22, 1888, Walter S. McSwain made homestead entry of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 20, and

the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 29, township 12 S., range 25 E., within the land district of Stockton, California.

On April 2, 1892, Mrs. Harriet A. Hostrawser filed a contest against McSwain's entry, charging that he "has wholly abandoned said tract, and changed his residence therefrom for more than six months since making said entry, and next prior to the date herein; that said tract is not settled upon and cultivated by said party as required by law."

Before the date fixed for the hearing, Mrs. Hostrawser presented to the local office the relinquishment of McSwain, alleging it to have been secured as the result of her contest, at the same time demanding the exercise of her preference right. Upon her homestead application, the register, on May 14, 1892, made the following indorsement: "The within application of Harriet A. Hostrawser to make homestead application for the" land in controversy "is hereby rejected for the reason that the tract of land described was withdrawn from disposal by Commissioner's letter of March 14, 1892."

The President, by proclamation of date the 14th of February, 1893, created the "Sierra Forest Reserve," under the authority of section 24 of the act of March 3, 1891 (26 Statutes, 1095), and the Commissioner's letter alluded to in the register's order of rejection, *supra*, was written for the purpose of effecting a temporary withdrawal pending consideration by your office of a petition for the reservation, presented by the American Forestry Association.

From the action of the local officers rejecting her application and denying her preference right, Mrs. Hostrawser appealed to your office, making the contention, first, that her application should have been "held subject to and awaiting the relief of the suspension of the township," and, second, that "the land embraced in her application was an entry already initiated at the date of the instructions issued to the registers and receivers relative to the Tulare (Sierra) Forest Reserve."

Upon both specifications your office held against the contestant, and she has brought her case on further appeal to this Department.

The proclamation of the President of the United States, definitely creating the Sierra Forest Reserve and establishing its boundaries (27 Statutes, 1059), excepts from the force and effect thereof

all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired.

There is here presented to the Department for adjudication, and for the first time, the right and standing of a successful contestant of an entry in a case where the land is embraced within territory that has been, subsequent to entry, set apart as a public reservation.

The filing of McSwain's relinquishment undoubtedly had the effect to revest the land in the government free of all incumbrance imposed by his entry, and while it is not so clear that the successful issue of

Mrs. Hostrawser's contest did not vest in her the preference right awarded by section 2 of the act of May 14, 1880, I am inclined to assimilate her attitude, in law, to that of the settler upon the public lands, of whom the supreme court of the United States has said that he does not, by his settlement and declaration of intention, "acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party." The Yosemite Valley case, 15 Wallace, p. 77, and authorities there cited.

The decision of your office is, therefore, affirmed.

FINAL PROOF—NOTICE—PAYMENT.

ANDREW DAVIS.

Personally naming an adverse claimant in the published notice of intention to submit final proof is not a sufficient compliance with the rule requiring such claimant to be specially cited.

One who applies for an extension of time for payment under the joint resolution of September 30, 1890, must show that the failure of crops is due to reasons for which he is not responsible.

Secretary Smith to the Commissioner of the General Land Office, June 18,
(J. I. H.) 1894. (P. J. C.)

The land involved in this appeal is the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 22, T. 3 S., R. 63 W., Denver, Colorado, land district.

The record shows that Andrew Davis filed his pre-emption declaratory statement for said tract September 16, 1889. On December 10, following Robert B. Wright made homestead entry of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section. Davis made final proof June 2, 1892, and on the same day applied for an extension of time for payment, under the joint resolution of Congress of September 30, 1890 (25 Stat., 684). By his corroborated affidavit it is shown that in the spring of 1890 he had five acres plowed and planted to corn; "that in the spring of 1891 he replanted the said five acres to corn;" that both crops were an entire failure; that in the spring of 1892 he "plowed five additional acres and planted the same to corn, potatoes and garden truck;" that he had expended all his money in improving said tract, and "by reason of a failure of his crops, and from other causes for which he is in no wise to blame, (he is) unable to make payment for this tract of land as required by law;" "that had his crops been good, and had he been enabled from other sources to secure sufficient means to further plow and cultivate," he would be able to make payment.

The local officers approved the final proof, and recommended that the extension of time be allowed. Your office, by letter of September 9, 1892, decided that the showing for extension was not sufficient, and

further, that "Davis should have specially cited Wright, the adverse homestead claimant, in his advertisement. This he will be required to do, in any event, before entry could be authorized." From this decision Davis appeals, assigning as error in holding that Wright was not specially cited, and in holding that sufficient showing was not presented to warrant the extension.

It appears by the copy of the advertised notice that Wright was specially named. It is addressed "to Robert B. Wright, and to all whom it may concern," by a line at the top of the notice.

In the case of *Reno v. Cole* (15 L. D., 174), it was expressly held by the Department that "personally mentioning the other claimants in the published notice, as in this case, is (not) a sufficient compliance with the rule requiring them to be *specially* cited." I am unable to find any sufficient reason for disturbing this ruling, which has become the settled practice of your office.

I do not think the showing made by the entryman was sufficient to warrant the extension of the time within which to make final payment. The joint resolution of Congress, which authorizes the extension of time, reads as follows—

That whenever it shall appear by the filing of such evidence in the offices of any register and receiver as shall be prescribed by the Secretary of the Interior, that any settler on the public lands, by reason of a failure of crops for which he is in no wise responsible, is unable to make the payment on his homestead or pre-emption claim required by law, the Commissioner of the General Land Office is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same becomes due.

It has been said that this is remedial legislation, and should therefore receive a liberal construction (*Edward W. Sheldon*, 16 L. D., 390). But I do not think the most generous construction could grant the request on the evidence presented. It is not shown that the failure of his meagre crop was not from any reason for "which he is in no wise responsible." It is a matter of common knowledge, I apprehend, that in the region where the land in controversy is situated, being on the so-called arid plains, corn, or other cereals, are not expected to mature without artificial irrigation. The planting of five acres of corn under the most favorable conditions in that region could not reasonably be expected to go very far toward paying for one hundred and sixty acres of land at double minimum price, such as this, especially in the absence of any showing that it was cultivated or properly irrigated.

The judgment of your office is therefore affirmed.

PRACTICE—HEARING—DEFAULT.

SUTPHIN *v.* GOWER.

Default at a hearing ordered by the Commissioner will not be excused on the ground that the defaulting party had filed a motion for the review of the decision ordering the hearing.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (W. F. M.)

On February 15, 1888, Daniel Gower presented homestead application for the NE. $\frac{1}{4}$ of section 25, township 9 N., range 2 W., of the land district of Grayling, Michigan.

On February 22, 1888, Loren M. Sutphin made application to enter the same land.

The register and receiver rejected both applications for the reason that the lands were within the indemnity limits of the grant for the benefit of the Jackson, Lansing and Saginaw Railroad Company, and, therefore, not subject to entry.

Both parties appealed, and by your office decision of July 7, 1888, it was held that the land in question had been restored to the public domain at the date of the rejected applications, and Gower, being the first applicant, was allowed to enter.

Subsequently it was brought to the attention of your office by Sutphin's counsel that the unselected lands within the indemnity limits of the above mentioned grant had not been restored to entry, but only to settlement, at the date of the two applications under consideration, and, upon an ex parte showing by Sutphin that he was the prior settler upon the land in controversy, and in response to his formal application therefor, by letter to the register and receiver of date the 11th of December, 1889, your office revoked its decision of July 7, 1888, and directed a hearing for the purpose of determining the question of priority of settlement as between the two applicants, upon which fact their rights in the premises depended.

Gower filed a motion for review of the order directing a hearing, and pending this motion the proceedings were not suspended in the local office, but the hearing was duly held at which Gower made default.

The register and receiver found that Sutphin settled on the land about the middle of March, 1888, some six months before the settlement of Gower, and, valuable improvements and continuous residence having been abundantly shown, they recommended that his entry be allowed.

The case is now here on appeal from the decision of your office affirming that of the local office.

The appellant complains that the case was decided on ex parte testimony, without cross examination, and without evidence for the defendant, and that there was no stay of proceedings while his motion for review was pending.

While it is true, as a general rule of practice in this Department, as well as in the courts, that a motion for review suspends all proceedings in a case until the motion is considered and passed on, yet, it is also a well established rule here, that an order of the Commissioner directing a hearing is an act within his discretion which will not, under ordinary circumstances, be interfered with by this Department. Such an order is executive in nature, rather than judicial, and is not a judgment, or decision, in the usual sense of those terms.

The hearing before the register and receiver was not technically an ex parte one, and was only actually so on account of the inexcusable laches of the appellant himself.

On the merits, I find that the evidence amply justifies the conclusion reached in the decision of your office, and the same is, therefore, affirmed.

HAMMEL v. SALZMAN.

Motion for review of departmental decision of November 1, 1893, 17 L. D., 496, sustained, and rehearing directed by Secretary Smith, June 18, 1894.

RAILROAD LANDS—CITIZENSHIP—SETTLEMENT.

BOGART v. DANIELS.

The right of purchase under the act of January 13, 1881, is not applicable to lands not withdrawn for the benefit of a railroad grant.

A married woman, an alien by birth, whose husband has declared his intention to become a citizen, occupies the status of one who has filed his declaration of intention, and in respect to citizenship is qualified to perfect title under section 5, act of March 3, 1887.

The right of purchase under said section is not defeated by a settlement claim acquired by a willful trespass on the possessory rights of the applicant.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (C. W. P.)

The case of Eugene V. Bogart against Elizabeth Daniels involves the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 29, T. 2 S., R. 67 W., Denver land district, Colorado.

The land in question lies within the granted limits of the grant to the Denver Pacific, now known as the Union Pacific Railway Company, the right of which attached August 20, 1869.

The record shows that, on February 21, 1866, one A. McPhaden filed his declaratory statement for the land, alleging settlement November 4, 1865 (cancelled for abandonment July 28, 1874,) which excepted the tract from the operation of the railroad grant. Union Pacific Railway Company v. Bogart *et al*, June 20, 1890. (Letter Press Copy-Book No.

200, p. 272), and the company's selection of the tract was canceled July 7, 1890.

A hearing was had to determine the rights of Mrs. Daniels and Mr. Bogart, respectively.

The local officers decided in favor of Bogart, and on appeal your office reversed their decision.

The record shows that February 24, 1885, Mrs. Daniels purchased the tract from the Platte Land Company for \$560, and received a conveyance thereof March 3, 1888. The Platte Land Company purchased of the railway company, February 6, 1882. After her purchase, in 1885, Mrs. Daniels took possession of the tract, and has ever since remained in possession, and made valuable improvements. On the 23d of May, 1885, she applied to purchase the tract under the act of January 13, 1881 (21 Stat., 315), and afterwards, on the 16th of October, 1888, she also applied to purchase the same under the act of March 3, 1887, (24 Stat., 556).

On June 29, 1885, Bogart applied to file his pre-emption declaratory statement for the tract, alleging settlement there on the same day.

Mrs. Daniels' application to purchase the tract under the act of January 13, 1881, confers no rights upon her, the tract not being withdrawn land for the benefit of the railway company. Benjamin H. Eaton (8 L. D., 344).

Has Mrs. Daniels a right to purchase from the government under the provisions of the 5th section of the act of March 3, 1887, (24 Stat., 556)?

Under this section it is held by the Department that it makes no difference whether the applicant is the immediate purchaser from the company, or a purchaser one or more degrees removed; that if he is a *bona fide* purchaser of the land, and has the required qualification as to citizenship, he is within the intendment of the statute, and if he be not the original purchaser from the company, it is immaterial what the qualifications of his immediate grantor, or the intervening purchasers may have been; and that it was not the intention of Congress to confirm sales made by the company, but rather to afford to citizens, or persons having declared their intentions to become such, who were *bona fide* purchasers of land to which the company had not title, a means of acquiring title from the government, to the exclusion of settlers or purchasers under the general land laws. Circular of Instructions of August 30, 1890, (11 L. D., 229).

The question arises: Is Mrs. Daniels within the condition prescribed by the act, that the purchaser shall be a citizen, or shall have declared his intention to become such?

The record shows that Mrs. Daniels is a married woman, the wife of the John Daniels, who testified in her behalf; that she is an alien by birth, and has not been naturalized, but that her husband, John Daniels, has declared his intention to become a citizen.

Section 1994 of the Revised Statutes declares that "any woman who is now, or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

Section 2168 declares that, "when any alien, who has complied with the first condition specified in Section 2165, (i. e. made his declaration of intention) dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law."

Section 1994 has been construed by the supreme court of the United States, in the case of *Kelly v. Owen, et al.* (7 Wall., 496), to mean that whenever a woman, who might be naturalized, is in a state of marriage to a citizen, she becomes by that fact a citizen also. Her citizenship, whenever it exists, confers citizenship upon her.

In the case of *Boyd v. Thayer* (143 U. S., 135) it was held that, under the naturalization laws, a minor acquires an inchoate *status* by the declaration of intention to become a citizen on the part of his parent.

In the case of *Scotford v. Huck* (8 L. D., 60), the Department held that, under section 2168 of the Revised Statutes, the declaration of intention to become a citizen, filed by Huck's father, who died during Huck's minority and prior to becoming a citizen, inured to Huck's benefit, although at the time of filing his declaratory statement he had not taken the oaths prescribed by law, upon condition that he availed himself thereof by taking the final oaths. See, also, the case of *Bartl v. West* (ib., 289). In the case of *Meriam v. Poggi* (17 L. D., 579) Meriam made homestead entry for the land in dispute on the 21st of May, 1887. On the 2d of June of that year, Miss Poggi presented her pre-emption declaratory statement for the land, alleging settlement on the 16th of March, 1887.

Miss Poggi was born in Italy in 1865, and came to America with her parents when she was eighteen years of age. May 30, 1887, she made declaration of intention to become a citizen, and the same day made her declaratory statement—which was after Meriam had made homestead entry for the land. Her father declared his intention to become a citizen during her minority, but did not attain full citizenship until after she became of age. Upon these facts, it was held by the Department that her status under the declaration of intention on the part of her father, who had not completed his naturalization before she attained her majority, was the same as that of a person who has filed his declaration of intention to become a citizen; and it was held that Miss Poggi was a qualified pre-emptor at the time she made settlement upon the land. In page 583 of the decision, it is said:

"Under the decision of the U. S. supreme court (*Boyd v. Thayer, supra*), it seems to me that her rights were the same under the declaration of intention on the part of her father, as they would have been had he died before she reached her majority.

In other words, that the minor child of an alien, who has declared his intention to become a citizen, but who does not complete his naturalization before the child attains his majority, is in the same position as the minor child of an alien who declares his intention to become a citizen, and dies before he is actually naturalized. Section 2168, of the Revised Statutes declares that 'the widow and children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law.'

Why are not these principles equally applicable to a wife, whose husband has declared his intention to become a citizen? I can perceive no solid distinction, in the view of these decisions, between a wife and a minor child.

When the husband obtains his naturalization papers, *eo instanti*, she too becomes a citizen.

If he dies before he is actually naturalized, she also becomes a citizen upon taking the prescribed oaths.

I am of opinion, on the strength of these authorities, that Mrs. Daniels is a qualified purchaser under section 5, of the act of March 3, 1887, and should be allowed to purchase the tract, unless it was excepted from the provisions of said section five, first, by being at the date of sale, February 6, 1882, in the *bona fide* occupation of an adverse claimant under the pre-emption or homestead laws of the United States whose claim and occupation has not since been voluntarily abandoned, or, secondly, unless the tract was settled upon subsequent to the first day of December, 1882, by a person claiming in good faith a right to enter the same under the settlement laws, in ignorance of her rights and equities in the premises. Chicago, St. Paul, Minneapolis and Omaha Railway Company (11 L. D., 607); Union Pacific Railway Company *v.* McKinley (14 L. D., 237).

Mrs. Daniels is not prevented from purchasing, by the first exception, because at the date of the sale by the railway company, the tract was not in the *bona fide* occupation of an adverse claimant under the pre-emption or homestead laws of the United States. The tract was sold by the railway company in 1882, and Bogart did not claim settlement of the tract until 1885.

Bogart made settlement on the tract in June, 1885, but at the time he made settlement the land was inclosed; and in his testimony he admits that when he put his first cabin on the land, he understood Mrs. Daniels claimed it; and that he threw the lumber for his cabin over the fence inclosing the land. I cannot think he was a *bona fide* settler upon the tract, or ignorant of Mrs. Daniels' rights and equities in the premises. On the contrary, the evidence shows that he was endeavoring to "jump" her claim, under pretense of an intention to make a *bona fide* settlement. Atherton *v.* Fowler (96 U. S., 513); Hosmer *v.* Wallace (97 Ib., 575); Quinby *v.* Conlan (104 Ib., 420); Chicago, St. Paul, M. and O. Ry. Co., *supra*; Union Pacific Ry. Co. *v.* McKinley, *supra*. The Department will not sanction and aid the accomplishment of this purpose.

My conclusion is, that Mrs. Daniels should be allowed to purchase the tract, and the application of Bogart rejected.

The judgment of your office is therefore affirmed.

DESERT LAND CONTEST—ACT OF MARCH 3, 1891.

FORSYTHE *v.* McCLURKEN.

A desert land claimant who has made an entry under the original desert land act, and, after the passage of the amendatory act of March, 3, 1891, applies in good faith for the benefit of its provisions, is thereafter entitled to the additional time, accorded by the later act, to show compliance with law.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (W. F. M.)

On December 15, 1888, John R. McClurken made desert land entry of the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and lots 6 and 7, section 6, township 8 N., range 30 E., of the land district of Walla Walla, Washington.

On December 10, 1891, he filed an affidavit, corroborated by two persons, alleging that "he has expended for the purpose of irrigation, reclamation and cultivation thereof, and in permanent improvements and in the purchase of water rights for the irrigation of the same, at least the sum of three dollars per acre, to wit, the sum of six hundred and ninety dollars," and, presenting therewith "a map showing the source of the water to be used for irrigation and reclamation," he asked that he be allowed "to perfect said entry and obtain a patent therefor under the act of March 3, 1891."

On February 9, 1892, Claude P. Forsythe filed an affidavit of contest, the specific allegations of which it is not necessary to set out here.

The customary notice was issued, and a hearing was fixed for March 21, 1892, on which day the contestee appeared, and through counsel, moved to dismiss the contest—

For the reason that the court has no jurisdiction of the subject matter set out in the complaint because the allegations thereof refer to the act of March, 1877, and that there is on file in this office the application of John R. McClurken, the contestee, to enter said described land under the provisions of the act of March 3, 1891, section two thereof and subsequent sections relating to desert land.

The register and receiver appear to have ignored this motion to dismiss, when made, but after hearing testimony they in effect sustained the motion by holding "as a conclusion of law that McClurken had until December 15, 1892, in which to show that he had complied with the act of March 3, 1891."

The case has been brought here on appeal from the decision of your office affirming the action of the register and receiver.

The act of March 3, 1891 (26 Stat., 1095), section 6, provides that "said claims, at the option of the claimant, may be perfected and pat-

ented under the provisions of said act, as amended by this act, so far as applicable," and this option having been sought to be exercised by the contestee, it only remains to be determined whether in the exercise thereof he has proceeded formally, and whether the act as amended is "applicable" to the case presented by him.

The only precedent, in point, reported in the books, is the case of John W. Herbert, 17 L. D., 398, where it is said that—

The affidavit of Herbert is corroborated by only one witness, and the map filed is very incomplete . . . giving little or no information, but the entryman has evidently acted in good faith, and if he complies with the law and files with his final proof, satisfactory evidence of having complied with the law, with a map showing the character and extent of his improvements, there being no protest or adverse claim, his proof will be considered, as under the act of March 3, 1891.

In the case at bar, as in the one just cited, the map filed is very incomplete, and beyond exhibiting the source of his water supply, affords little information of his scheme of irrigation; but the cases are also similar in that the good faith of the entryman in each is manifest. It is to be observed, however, that they are unlike in that there is a contest in the present case, which arose, it is to be further noted, after the contestee had sought to avail himself of the advantages of the later legislation. It was the clear duty of the register and receiver to act on his application when presented, and under the ruling of John W. Herbert, *supra*, it was their further duty to accord him the status applied for, and, having done so, it would have been error to receive Forsythe's contest.

It is my conclusion, therefore, that McClurken's motion to dismiss Forsythe's contest should have been sustained, and the decision of your office, so holding, is, accordingly, affirmed.

The suspended final proof submitted by the claimant, and transmitted with your office letter "H" of October 4, 1893, is herewith returned for appropriate action thereon, as also the record transmitted with your office letter "H" of April 4, 1893.

SILVA *v.* PAUGH.

Motion for review of departmental decision of December 16, 1893, 17 L. D., 540, denied by Secretary Smith, June 18, 1894.

ABANDONED MILITARY RESERVATION - SETTLEMENT.

SCHMIDT ET AL. *v.* MASTERS.

A settler on lands within the limits of the Fort Crawford military reservation subsequent to October 14, and prior to December 22, 1890, is not a trespasser on such lands, and will be protected as against a subsequent settler on the same land.

The repeal of the pre-emption law does not affect the disposition of the Ute Indian lands under the act of June 15, 1880, which requires said lands to be disposed of by "cash entry only in accordance with existing law."

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (G. B. G.)

The land involved is the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 35, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 36, all in T. 48 N., R. 9 W., Montrose land district, Colorado.

On October 19, 1891, Mary A. Dougherty made pre-emption filing, covering the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 36, together with other lands, alleging settlement thereon the same day.

On October 20, 1891, John A. Masters filed pre-emption declaratory statement for all the land involved in this controversy, alleging settlement thereon January 9, 1891.

On October 31, 1891, Wallace Schmidt made pre-emption filing for the same land filed for by Masters, alleging settlement thereon October 30, 1891.

On December 21, 1891, Masters made final pre-emption proof, and applied to purchase the tract claimed by him, and on the same day Schmidt filed a written protest therein against the allowance of said final proof, alleging, among other things, as set forth in the opinion of your office:

That the settlement of Masters was illegal, and that it was made before the land was open to settlement; that at the time of the settlement, he was a trespasser on said land; that he settled on the same merely for speculative purposes; that he had not made said land his home in good faith, and that he had abandoned all right—if he ever had any—to the same.

On December 31, 1891, Dougherty filed protest against the allowance of said Masters's application to purchase, on the ground that she claimed a portion of said land, and that Masters was a trespasser on the land in controversy.

By agreement of the parties, the cases were consolidated, and a hearing was had, on the termination of which the local officers found in favor of Masters, and recommended that he be allowed to enter the land in controversy, and further recommended that Schmidt's filing be canceled, and that Dougherty's filing be canceled, in so far as it conflicted with Masters's claim.

On appeal, your office affirmed the finding of the register and receiver, and further appeal by both Schmidt and Dougherty brings the case to the Department for final adjudication on the law and the facts.

There are two questions in the case.

First. Were Masters's settlement, occupation and improvements in good faith?

Second. Was the said Masters a trespasser on government land when he first made his settlement, and, if so, was such trespass a bar to the

initiation of a right against the government to the exclusion of subsequent settlers on the same land?

The question of the bona fides of the defendant's settlement is largely one of fact, and has been answered by the concurring decisions of your office and the local land office, in the affirmative, and after an examination of the record, such finding is hereby affirmed.

On the second question, it will not be inappropriate to submit a brief history of the lands in controversy, that their present status may be better understood.

The land is within the limits of a former Ute Indian reservation, and by a treaty, which was confirmed by the act of June 15, 1880 (21 Stat., 199), was ceded to the United States.

It is also within the limits of a former military reservation, known as the Fort Crawford military reservation. On October 14, 1890, the Secretary of War transferred the lands embraced in said reservation to the Secretary of the Interior, for disposition, as provided in the act of July 5, 1884 (23 Stat., 103).

It appearing that these reservation lands could not be disposed of under said act, because of their former status as Ute Indian lands, and that they could only be disposed of as directed by the treaty stipulations of the act of June 15, 1880 (*supra*), the Secretary of War recommended that said executive order "be canceled, and that the said reservation be turned over to the Department of the Interior, under the act of July 5, 1884, or as may be otherwise provided by law."

This recommendation was approved by the President on December 22, 1890, and the Secretary of the Interior was directed to "cause the same to be noted on the records of his office."

In the case of *ex parte* Henly C. Rock (7 L. D., 191-193,) it was held that military reservation lands within the territory ceded to the United States by the Ute Indians, became subject to disposal under the act of June 15, 1880, "when abandoned and placed under the control of the Secretary of the Interior."

As has been already seen, the lands embraced in the Fort Crawford military reservation, of which the tracts in controversy are a part, were abandoned and turned over to the Secretary of the Interior, on October 14, 1890, and while the order of that date, transferring said lands, was defective, in that it did not clothe the Land Department with adequate authority for their disposal, and was afterwards revoked, it nevertheless operated as a transfer of the lands at that date, and they immediately became open to settlement under the pre-emption laws. Masters, as has been seen, alleged in his declaratory statement, settlement on January 9, 1891. It is shown by the record that his settlement was made October 29, 1890. From the conclusion hereinbefore reached, that the land in controversy was subject to settlement after October 14, 1890, it is not material whether such settlement was made October 29, 1890, or on January 9, 1891. In either event, such settlement was

subsequent to the time at which said land became part of the public domain, and his settlement was not in violation of any of the laws of the United States.

It is therefore held that a settler on lands within the limits of the Fort Crawford military reservation, subsequent to October 14, and prior to December 22, 1890, is not a trespasser on such lands, and will be protected as against a subsequent settler on the same land.

The government being a party in interest, it becomes my duty to consider a further question presented by the record.

It appears that after Masters's settlement, and before the filing of his declaratory statement, the pre-emption laws were repealed by the act of March 3, 1891 (26 Stat., 1095-1097), and the question arises, whether a pre-emption entry can be allowed on said land subsequent to the passage of said act.

The act of June 15, 1880, *supra*, the title of which is, "An act to accept and ratify the agreement submitted by the confederated bands of Ute Indians in Colorado, for the sale of their reservation in said State," etc., provides in the third section thereof, "That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement, under the provisions of the homestead law; but shall be subject to cash entry only, in accordance with existing law," and the act, *supra*, repealing the pre-emption laws, in section ten thereof, provides as follows:

That nothing in this act shall change, repeal or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of lands ceded to the United States to be disposed of for the benefit of such tribes . . . and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements

It follows that the pre-emption laws are still in force, so far as they apply to the disposition of these particular lands.

The judgment appealed from is affirmed.

MINING CLAIM—SALE—AMENDED LOCATION.

GRAY COPPER LODE.

An amended location, made by one who has parted with his title to the claim, can not be recognized as securing any right to him.

Secretary Smith to the Commissioner of the General Land Office, June 18,
J. I. H.) 1894. (P. J. C.)

I am in receipt, through your office, of a letter from Walter F. Wheeler, attorney for Agnes G. Herzinger, applicant for a patent for the Gray Copper Lode, in Red Mountain mining district, Montrose Colorado, land district, relative to her application for patent for said lode.

By reference to departmental decision of July 7, 1893 (269, L. and R., 319), it will be seen that this applicant became the owner of the Gray Copper Lode March 12, 1888, as it was then located, by purchase from Adam G. Herzinger, and the latter subsequently filed an amended location of "the major portion of the same ground deeded" to the applicant. Adam G. Herzinger died intestate shortly thereafter, and Agnes G. was appointed administratrix of his estate, and as such made application for patent for the lode claim, and entry thereof, as amended, December 16, 1891, in her individual name. Your office held the entry for cancellation on the ground that the lode was not a part of the estate of the deceased; "that a patent could not issue to her as administratrix, because as such she had no interest in said location . . . nor could it issue to her as an individual for the reason that the application was made by her as administratrix."

On appeal this judgment was affirmed, and it was decided that Mr. Herzinger "could not amend a location that he did not own." It is shown by said departmental decision that the deed made by him to Mrs. Herzinger was not recorded until June 30, 1891. It was probably by reason of this deed appearing in the abstract of title that she was permitted to make the entry.

The letter of counsel is a request to allow the applicant to withdraw the abstract presented, and substitute therefor one brought down to the date of her application, which would show the title to the claim to be in the estate; also to make the necessary changes in the other papers, and then complete the entry as administratrix.

On consideration of this matter I have concluded to consider this letter as a motion for review. There having been no adverse claim, and the applicant and the government being the only parties in interest, I think I may exercise the supervisory power vested in the Secretary of the Interior, and review it.

The only object the applicant seems to have in view is to speedily and without additional expense perfect her entry of the claim. It seems to me that to grant her request is to recognize the amended location made by her husband in his own name. This act on his part, so far, at least, as putting the title to the claim in him was concerned, was clearly illegal, and the Department could not recognize that action. But it seems to me that if the applicant will present proof, in the shape of her own and other affidavits, that she was at the time of the amended location the sole and only owner of the claim, and that the amended location was made for her sole use and benefit, her husband acting as her agent for the purpose, the entry may pass to patent in her individual name.

This proof should be forwarded to you, and if satisfactory, you will act thereon as above indicated. The former decision is modified to this extent.

HENRY v. STANTON.

Motion for review of departmental decision of November 9, 1893, 17 L. D., 519, denied by Secretary Smith, June 18, 1894.

SETTLEMENT RIGHTS—RELINQUISHMENT.

BLAUVELT v. MASDEN.

The right of a settler who is residing on land covered by the entry of another attaches at once on the relinquishment and cancellation of such entry, and is superior to a pre-emption claim based on a filing, made immediately after the relinquishment, and settlement on the same day.

Secretary Smith to the Commissioner of the General Land Office, June 18, 1894. (J. I. H.) (J. L.)

I have considered the appeal of Fred Masden from your office decision of June 10, 1892, in the case of James Blauvelt v. Fred Masden, reversing the decision of the local officers; and awarding to Blauvelt priority of right to the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 31, T. 5 S., R. 23 W., 6th p. m., Kirwin land district, Kansas, accepting Blauvelt's final proof therefor, and directing final certificate to be issued to him on payment of the proper amount, and thereupon the cancellation of Masden's declaratory statement No. 22,776 for part of said land.

The material facts disclosed by the record are as follows:

On March 21, 1888, one G. W. Stahlman (whose timber-culture entry No. 9656 of July 24, 1884, for the whole of the NW. $\frac{1}{4}$ of said section 31, had been held for cancellation and was then pending on his appeal), relinquished to the United States all his right, title and interest in and to said quarter section.

On the same day, March 21, 1888, Fred Masden filed his declaratory statement No. 22,776 for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 31, alleging settlement on that day.

On November 10, 1888, after publication, Masden offered final proof, against which Blauvelt filed an affidavit of contest or protest, duly corroborated, alleging actual settlement and improvements on February 11, 1885, and continuous residence, occupation and cultivation since that date, on said land, in good faith.

The hearing of said contest or protest was postponed until December 17, 1888, on which day both parties appeared with their attorneys and witnesses. Masden's motion to dismiss Blauvelt's protest was overruled. The witnesses were then examined, and the hearing closed.

On January 15, 1889, the local officers rendered their joint decision recommending that Blauvelt's protest against Masden's final proof be dismissed, and that Masden's final proof be passed for patent.

And Blauvelt appealed to your office.

On July 28, 1889, in obedience to the order of the Commissioner of the General Land Office by letter "G" of July 1, 1889, issued upon an application filed April 13, and forwarded June 29, 1888, Blauvelt was permitted to file his declaratory statement No. 23111, embracing the land in controversy, and alleging settlement in the year 1885 and residence ever since.

On September 16, 1889, after publication, Blauvelt offered final proof, and tendered the purchase money; against which Masden filed an affidavit of contest or protest for the reason of his, Masden's, adverse claim to the land in controversy. Whereupon the local officers rejected Blauvelt's final proof "for the reason that the protest of Fred Masden's proof by Blauvelt, covering part of same tract, is now pending on appeal before the Commissioner."

On June 10, 1892, your office reversed the decision of the local officers rendered on January 15, 1889; awarded to Blauvelt the land claimed by him; accepted his final proof; and directed that final certificate be issued to him upon payment of the proper amount, and that thereupon Masden's declaratory statement No. 22,776, be canceled.

And Masden appealed to this Department.

It is clearly proved that in the month of February, 1885, Blauvelt settled upon the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 31, with intent and purpose to take, occupy and hold as his home under the pre-emption laws, the four forty-acre tracts now claimed by him. As early as February 11, 1885, he offered at the land office his declaratory statement in which he specified said four forty-acre tracts as his pre-emption claim. In conversation with his neighbors he pointed out the four forties that he claimed. He made upon the most southerly one of the four, valuable improvements, including a dwelling house, a stable and a well fifty feet deep. He has cultivated part of the land every year; and has continuously resided on the land since 1885. His prior settlement and continuous residence, and the limits of his claim were well known to his neighbors, and especially to Fred Masden on March 21, 1888, when he delivered Stahlman's relinquishment of the whole NW. $\frac{1}{4}$ of Sec. 31, and filed his own declaratory statement for three-fourths thereof.

The right of Blauvelt who was residing upon the land covered by Stahlman's entry, attached *eo instanti* on the relinquishment and cancellation of Stahlman's entry, and is superior to the claim of Masden who filed his declaratory statement immediately after the relinquishment. *Zaspell v. Nolan* (13 L. D., 148); *Stone v. Cowles* (13 L. D., 192).

Masden appeals upon the ground that the land in controversy between him and Blauvelt was not subject to settlement by Blauvelt between July 24, 1884, and March 21, 1888, because during that period of time, the land was covered by G. W. Stahlman's timber-culture entry No. 9656, which, although held for cancellation, was still pending on appeal until the filing of the relinquishment; and that there-

fore, Blauvelt, although a prior actual settler, was not a legal settler, and he, Masden, was the first and only legal settler on the land involved.

If Stahlman had perfected his timber-culture entry, *he* would have had the right to question the legality of Blauvelt's settlement. "It is a well established rule that as between a settler and a record entryman no superior right can be acquired; but as between subsequent claimants, the settlement first made in point of time is entitled to the highest consideration, as soon as the record entryman's claim is relinquished." *Hall v. Levy* (11 L. D., 284-288). Blauvelt's settlement was prior to Masden's.

Your office decision of June 10, 1892, is hereby affirmed.

HOMESTEAD ENTRY—RESIDENCE—CONTEST AFFIDAVIT.

PAXTON *v.* OWEN.

The rule which allows a homesteader, who makes entry under section 2290 R. S., six months within which to establish residence, is not applicable to an entry under section 2294 R. S., which is dependent upon antecedent settlement and residence.

A homestead entry made in bad faith, and not for the purpose of actual settlement and cultivation, must be canceled.

The sufficiency of an affidavit of contest should not be considered after the hearing without objection thereto.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (J. L.)

I have considered the appeal of S. Z. Paxton from your office decision of December 21, 1892, in the case of Stephen Z. Paxton *v.* Robert S. Owen, reversing the decision of the local officers, and dismissing Paxton's contest against Owen's homestead entry No. 6,518, for the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lots 1, 2, and 3, of Sec. 30, T. 21 S., R. 1 W., Willamette meridian, Roseburg land district, Oregon.

On May 18, 1891, Owen made homestead entry of said land under Sec. 2294 of the Revised Statutes of the United States. On August 27, 1891, Paxton filed his affidavit of contest against said entry, corroborated by eight witnesses.

A hearing was had October 22, 1891, upon testimony taken on October 6, 7, and 8, 1891, before W. P. Lockwood, notary public, at Cottage Grove, Lane county, Oregon; at which time and place both parties were present with their attorneys and witnesses.

On January 19, 1892, the local officers rendered their joint decision recommending that Owen's homestead entry be canceled, and that Paxton be allowed to enter the land.

Owen appealed to your office.

On December 21, 1892, your office reversed the decision of the local officers, and dismissed Paxton's contest. And Paxton has appealed to this Department.

Owen filed his application to enter under section 2294 of the Revised Statutes of the United States. Therefore the questions of his settlement, improvements and residence are relevant and material in this contest. The rule, or rather the practice of the Department, which allows a homesteader who applies under section 2290 of the Revised Statutes, six months within which to make settlement, begin improvements and establish residence, does not apply to such entries. They depend upon proof of antecedent settlement, improvement and residence. On May 16, 1891, before the clerk of the circuit court for Lane county, Oregon, at his office, Owen solemnly swore: "That I am now residing on the land I desire to enter, and that I have made a *bona fide* improvement and settlement thereon; that said settlement was commenced May 13, 1891; that my improvements consist of house and cultivation, and that the value of the same is \$25." The testimony clearly proves that said sworn statement was untrue.

It is proved by the uncontradicted testimony of six witnesses that Owen repeatedly said, about the time of his entry, both before and after it, that he did not want the land, and would not have it; that he and Mr. Paxton could not get along together; and that he took the claim to get rid of Paxton and his family.

After careful examination of all the testimony, I find that Owen's entry was made in bad faith, and not for the purpose of actual settlement and cultivation, and without intent to endeavor to comply faithfully and honestly with the requirements of the homestead laws and make this tract of land a home for himself and family. He at the time resided, and for nearly two years before had resided, and until the time of hearing continued to reside upon an adjoining tract, which he says is the property of his wife, and where he had his home.

I find that Paxton established his residence upon the land in contest in April, 1888, and afterwards up to the time of hearing, continued to occupy and live upon it, with his family, with intent to enter it as his homestead and make it his home; all in good faith. There is no question as to the sufficiency of his improvements.

Your office erred in holding that Paxton's affidavit of contest did not set forth a sufficient cause of action, and that the local officers erred in entertaining the contest and ordering a hearing. Moreover, if the affidavit of contest had been defective, it was too late after the hearing without objection being made, to consider its insufficiency. *Smith v. Johnson* (9 L. D., 255); *Bushnell v. Earl* (17 L. D., 4); *Smith v. Brandes* (2 L. D., 95); *Condon v. Arnold* (2 L. D., 96); *Bridges v. Curran* (7 L. D., 395). See also 7 L. D., 408; 9 L. D., 148 and 327; 10 L. D., 133; 11 L. D., 166 and 278.

Your office decision is hereby reversed; and the decision of the local officers is affirmed.

PATENT—DEATH OF ENTRYMAN—ACT OF JUNE 3, 1878.

ISOM C. MURRAY ET AL.

Where the death of a purchaser under the act of June 3, 1878, is disclosed by the record patent should issue in the name of the heirs generally.

Secretary Smith to the Commissioner of the General Land Office, June 18,
(J. I. H.) 1894. (E. M. R.)

This case involves lots 1, 2, 3, and 4, Sec. 2, T. 13 N., R. 15 W., San Francisco land district, California.

The record shows that I. C. Murray made cash entry for the above described tract on March 5, 1888, under the act of June 3, 1878. Certificate was issued to Isom C. Murray, but as it appeared in the records of the case that the name was sometimes written "Isom" and sometimes "Ison," on March 31, 1892, your office instructed the register and receiver to call upon the claimant for an affidavit showing the correct manner of spelling his name.

On June 2, 1892, the local officers transmitted to your office the affidavit of the widow of the entryman, setting forth that the correct name is Isom C. Murray, and on June 18, 1892, the local officers were directed to correct the certificate and make it read to the heirs of Isom C. Murray, deceased.

August 3, 1892, your office, in response to a letter from John C. Ruddock, of San Francisco, setting forth that he was the transferee of the entryman, and requesting that the patent should issue in the name of the deceased so that he might have a good title of record to the land, re-affirmed your former decision.

Subsequently, on a motion for review made by the transferee, John C. Ruddock, on February 28, 1893, the decision was adhered to.

The case is now before the Department upon appeal. There is but one question presented by the record, and that is: Can a patent be issued to a dead man?

In *ex-parte* Clara Huls (9 L.D., 401), the syllabus is as follows:

Where the death of the homesteader is disclosed by the record, patent should issue in the name of the heirs generally.

And on page 402 thereof, Assistant Secretary Chandler said:

No patent therefore can be issued in his name as the government does not issue its patent to a person not in existence, as a matter of course.

On July 16, 1891, Acting Secretary Chandler said in his instructions to the Commissioner of the General Land Office (13 L. D., 49), in speaking of desert land entries:

It may be asserted as a sound rule governing the issuance of patents in desert-lands cases that where it is shown that the entryman is dead, no patent ought to be issued in his name. In all such cases patent should be issued in the name of the heirs of the entryman generally, without specifically naming them. For example: if the entryman's name is John Smith, then patent should be issued "To the heirs

of John Smith, deceased," leaving to the courts of the respective localities the duty of ascertaining who the particular heirs are and what their particular interests are under the law of the State or Territory in which the land is situated.

It will thus be seen that the question raised by the appeal is *stare decisis* and there appears to be no good reason why the settled rule of the Department should now be changed. The decision appealed from is therefore affirmed.

PRACTICE—NOTICE OF APPEAL—SETTLEMENT.

STUBBLEFIELD v. HONEYFIELD.

In the service of notice of appeal by mail it is sufficient if the copy thereof is mailed the opposite party within the time allowed for filing the appeal.

During a period in which the local office is closed time does not run against a settler in the matter of asserting his claim.

Acts of settlement to be received as such must be followed within a reasonable time by the establishment of residence.

The case of the Oregon Central Military Wagon Road Co. v. Hart, 17 L. D., 480, overruled.

Secretary Smith to the Commissioner of the General Land Office, June 18,
(J. I. H.) 1894. (F. W. C.)

I have considered the appeal by Frank Stubblefield from your office decision of December 20, 1892, in the matter of his contest against the homestead entry by George Honeyfield, covering the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 17, T. 31 N., R. 25 E., Clayton land district, New Mexico.

On August 10, 1891, Honeyfield applied to make entry of this land at the Folsom land office, the land at that time being in the Folsom land district.

Due to the death of the register at that office, he was informed that an entry could not then be allowed for the land.

He went upon the land the next day and placed some poles in position for making a corral.

The office at Folsom was opened for business on November 3, 1891, and on the 11th of that month he made the homestead entry in question.

On January 23, 1892, Stubblefield filed a contest against said entry, alleging that his family had been living thereon since September 4, 1891; that he had applied to enter the land on August 27, 1891, but was unable to make entry due to the vacancy in the office of register, and that he had been unable to sooner apply since the re-opening of the land office.

Upon this contest hearing was held before the local officers on March 3, 1892, and upon the testimony offered they recommended the cancellation of Honeyfield's entry.

Upon appeal, your office decision reversed that of the local officers and dismissed the contest of Stubblefield, on the ground "that

defendant has established his priority of settlement and that the land should be awarded to him."

From said decision an appeal was filed in your office on March 10, 1892, for the dismissal of which the defendant moves on the ground that notice was not received by him until March 17, 1893.

The report from the local officers shows that notice of your office decision was mailed contestant on January 5, 1893; consequently, the sixty days allowed expired March 6, 1893, but as notice was given by mail, ten days additional are allowed for the transmission of papers, and the time did not expire until March 16, 1893.

The appeal shows that a copy was registered defendant on March 10, 1893, from Washington, D. C.

Rule 93 of practice requires that—

A copy of the notice of appeal, specification of errors, and all arguments of either party, shall be served on the opposite party within the time allowed for filing the same.

The question arises was the service in this case within the rule?

Rule 94 of practice is as follows:

Such service shall be made personally or by registered letter.

Rule 96 of practice provides:

Proof of service by registered letter shall be the affidavit of the person mailing the letter attached to a copy of the post-office receipt.

As to the time to be allowed for the transmission of notice of the appeal by registered mail, the rules are silent.

In the case of *Boggs v. West Las Animas Townsite* (5 L. D., 475), it was held, in effect, that if the copy was mailed the opposite party within the time allowed for the filing of the appeal, the service was sufficient under the rules. This was the practice for many years until the decision in the case of the *Oregon Central Military Wagon Road Co., v. Hart* (17 L. D., 430), wherein it was held that—

Mailing a notice of appeal prior to the expiration of the time allowed for appeal, is not the service of notice required, if in due course of the mails the notice could not be received by the opposite party until after the expiration of said period. (Syllabus.)

In the last mentioned case no reference was made to the decision in the case of *Boggs v. West Las Animas Townsite* (*supra*) and said decision has never been specifically overruled.

If the Hart case is to be followed, although warranted by a strict construction of the rules of practice, it would be necessary to ascertain the exact time required, under ordinary circumstances, for the carrying of the mails between the point from which the copy is mailed to the address of the opposite party.

In offices off the lines of railroads, and where the mail is not carried daily but only at stated periods, it might be impossible of ascertainment, and if insisted on, might work a great hardship, especially upon attorneys resident here at Washington.

In view of the peculiar circumstances, and as the rule in *Boggs v. West Las Animas Townsite* (*supra*) was so long followed and has never been specifically overruled, I have concluded, after a careful consideration of the matter, to adhere to the ruling in that case, and therefore overrule the case of the *Oregon Central Military Wagon Road Co. v. Hart* (*supra*).

The motion to dismiss is therefore overruled.

Having determined that the appeal by Stubblefield was filed and served in time, I have considered the case on its merits.

The testimony shows, beyond question, that Stubblefield built a house upon what he supposed was the land in question, in the latter part of August 1891, into which he moved his family on September 4, 1891, where they were still residing at the date of hearing March 3, 1892. An attempt was made at the hearing to show that this house was over the line a short distance and if admitted to be, it would not militate against his rights in the premises, as there is no charge that he ever claimed any other than the land in question.

The local office being closed until November 3, 1891 he is protected in this settlement by his contest brought January 23, 1892.

Honeyfield made entry on November 11, 1891, and claims settlement on August 11, 1891, on which date he placed some poles in position for use in corralling his horse when at the claim. Admitting that said act of placing poles in position for the corralling of his horse constituted an act of settlement, yet as nothing further had been done towards establishing a residence upon the land to the date of hearing (more than six months from the performance of said alleged acts of settlement), any rights gained thereby were forfeited and his rights must depend upon his entry.

At the date of his entry (November 11, 1891), Stubblefield had been living upon the land for more than a month, and his claim by reason thereof is clearly superior to that of Honeyfield.

It is shown that for the purpose of securing a peaceable adjustment of the matter, Stubblefield agreed to sell Honeyfield his improvements but no sale was actually made or possession taken and Stubblefield remained in possession.

Under the circumstances, that should not cause him to forfeit his prior right to the land, and upon the record as made, I reverse your office decision and sustain that of the local office, and direct that upon the completion of entry by Stubblefield, the entry by Honeyfield be canceled.

SETTLEMENT CLAIM—RESIDENCE.

EDWARDS *v.* FORD ET AL.

One who retains residence at his former home for the purpose of voting and holding office there is precluded thereby from claiming residence on his land during such period.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (I. D.)

James P. Edwards, plaintiff in the case of James P. Edwards *v.* Jesse Ford and Mollie M. O'Connor, appeals from your office decision of January 16, 1893, involving the SW. $\frac{1}{4}$, Sec. 19, T. 51, R. 35 W., Marquette land district, Michigan.

This land was of the lands restored to the public domain by the act of March 2, 1889, being opposite the unconstructed portion of the Marquette, Houghton and Ontonagon Railroad, in Michigan.

In your office decision of January 16, 1893, you say:

From July 21, 1860, to Nov. 7, 1891, the land was wholly without the jurisdiction of the government.

It had no power to dispose of the same, and, as a consequence thereof, neither of Ford's applications has any effect, and neither Edwards nor Miss O'Connor gained any rights by virtue of their respective application. See the case of Horace B. Rogers *et al.* (10 L.D., 29).

For this reason Ford's application to enter is rejected, subject to appeal.

Edwards and Miss O'Connor are thus left as contestants for the land, without either of them having a legal application to enter on file.

The case of Rogers, cited, was expressly overruled in New Orleans Pacific Railway company (14 L.D., 321), and the decision in McKernan *v.* Baily (17 L.D., 494) sustains the position that these lands become part of the public domain upon the passage of the act of March 2, 1889, and open to settlement from that day.

This case, therefore, will be considered upon the applications for entry of Ford, upon March 6, 1889; that of Miss O'Connor upon May 1, 1889, and her prior settlement claimed from March 7, 1889; and that of Edwards upon May 1, 1889, and his prior settlement claimed from January, 1888.

While Edwards entered upon, made valuable improvements, and, as the local officers found from the testimony, showed conclusively that he intended ultimately to make that his home, yet, on March 2, 1889, and, in fact, until March 9, he remained a legal resident of Houghton, in another township, voting there until March 9, 1889, and did not become both a legal and actual resident on the land until March 13, 1889.

Miss O'Connor bases her claim on her entry of May 1, 1889, with settlement claimed as of March 7, 1889, but which really was not made until after March 13, 1889, when Edwards was on the land.

Ford relies on his application to enter of March 6, 1889.

Edwards' retaining a residence for voting purposes and holding office in another township, precludes him from claiming residence on the land for homestead purposes before March 13, 1889. *George T. Burns* (4 L. D., 62); *Hart v. McHugh* (17 L. D., 176).

Ford's application to enter was one day before the date Miss O'Connor claims any act of settlement.

Your office decision is overruled, the applications of Miss O'Connor and James P. Edwards will be dismissed, and Jesse Ford will be allowed to make homestead entry upon his application of March 6, 1889.

OKLAHOMA TOWNSITE—LOT CLAIMANTS.

ELLIS v. SNEED.

A certificate of right issued to a lot claimant by the municipal authorities of a town puts an adverse claimant on his defense as to priority of occupation, but is not conclusive, and, if shown to have been issued without due basis therefor loses all value as evidence.

Failure to improve a lot may be excused when due to the unwarranted interference of the municipal authorities of the town.

Secretary Smith to the Commissioner of the General Land Office, June 18,
(J. I. H.) 1894. (W. F. M.)

This controversy arises out of the applications of Joshua A. Ellis and Constantine P. Sneed, filed before the board of townsite trustees, No. 1, assigned to Guthrie, Oklahoma, on September 19, 1890, for lot No. 11, block No. 58, according to the authorized survey of that town.

Ellis bases his claim upon a title derived, through numerous mesne conveyances, from William Canning and J. W. Drace, to whom the mayor and council of Guthrie had issued warranty certificates, while Sneed claims by virtue of priority of occupation and settlement.

The decree of the trustee board, rendered March 10, 1891, after hearing evidence in behalf of both applicants, is in the following words:

Because of the evidence of occupancy—of a *prima facie* character—afforded by the possession and ownership of said warranty certificates and because of his actual occupancy of the said premises, through or by others, as his tenants, it is adjudged that a deed should be executed and delivered to the said Joshua A. Ellis for lot 11, in block 58.

From the decision of your office reversing this decree and awarding the lot to Sneed, the case has been brought here on appeal by Ellis.

The careful and conscientious manner in which the testimony is set out in the decision appealed from renders it unnecessary for me to do more than to refer briefly to certain facts and circumstances that, in my opinion, control the case.

The act of Congress of May 14, 1890, entitled "An act to provide for townsite entries of lands in what is known as 'Oklahoma,' and for other purposes," 26 Statutes, p. 109, in its second section, provides—

That in the execution of such trust, and for the purpose of the conveyance of title

by said trustees, any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any townsite the subject of entry hereunder, shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse claim to said property such certificate shall only be *prima facie* evidence of the claim or occupancy of the holder.

This act fixes with reasonable definiteness the effect to be given to the certificates issued by the municipal authorities of a town. They import full proof in the absence of an adverse claim, and where there is a contest they serve to put the adverse claimant upon his defense. Having reached this stage, however, it is clear that any controversy arising out of conflicting applications for deeds, must be decided according as the testimony may preponderate the one way or the other.

The warranty certificates which form the basis of Ellis's claim were issued upon the faith of "Verdicts of the Board of Arbitration," a sort of extrajudicial court organized by the people of Guthrie, and they were in the following form:

To the Mayor of Guthrie, Indian Territory:

The board of arbitration having heard the evidence of all claimants appearing before us to lot No. 11, in block No. 58 of the recorded plat of the city of Guthrie, Indian Territory, finds J. A. Drace be awarded the east half of lot 11, block 58, to be the legal holder, and that said claimant as the occupant in good faith, has improved said lot in a substantial manner, and we recommend that a warranty certificate be issued accordingly.

A similar verdict was rendered in favor of William Canning, awarding him the west half of the same lot. Now, the testimony shows with the utmost conclusiveness that neither Drace nor Canning ever appeared before the board of arbitration as applicants for the lot, that neither of them were occupants of the lot in good faith, or otherwise, and neither had improved it in a substantial, or any other manner, at the date of the board's verdicts, on May 16, 1889. Drace, one of the beneficiaries of the board's gratuitous liberality, was a witness at the hearing, but made no effort to supply a theory in explanation of the board's extraordinary judgment. He frankly admitted, however, that neither he nor Canning asserted any claim to the lot.

These facts serve to strip the warranty certificates of all value as evidence, and upon the question of priority of occupation, I find that the testimony is overwhelmingly in favor of the claim of Sneed. I think, too, that he was deterred from improving the lot, as we must assume he would otherwise have done, by the unwarranted interference of the marshals and police of the city of Guthrie. It appears that the authorities of that city considered the verdicts of the board of arbitration conclusive of the rights of the parties, and proceeding upon that theory dispossessed all persons claiming adversely to those in favor of whom the board had rendered verdicts.

The decision of your office is therefore affirmed.

RAILROAD GRANT—INDIAN OCCUPANCY—ACT OF JUNE 22, 1874.

NORTHERN PACIFIC R. R. CO. v. OLD CHARLEY ET AL.

The unauthorized possession and occupancy of land by non-tribal Indians at the date of the withdrawal on general route will not serve to except the land covered thereby from the operation of the grant; nor will the fact that the homestead privilege was subsequently conferred upon such Indians protect them as against the grant.

The waiver of the company's claim in such case will relieve the entries of the Indian occupants from conflict with the grant, and entitle the company to select lieu lands under the act of June 22, 1874.

Secretary Smith to the Commissioner of the General Land Office, June 18,
(J. I. H.) 1894. (F. W. C.)

With your office letters of April 5, 13, 15, and 22, 1887, were forwarded the records in the following cases, embracing land covered by Indian homesteads, on appeal by the Northern Pacific Railroad Company, from your office decisions holding said lands to be excepted from its grant, viz:

Old Charley,	Hd. 3244,	F. C. 1000,	W. $\frac{1}{2}$ SW. $\frac{1}{4}$,	Sec. 17, T. 13 N., R. 37 E.,
Kamiakin,	" 3249	" " 1004,	E. $\frac{1}{2}$ NW. $\frac{1}{4}$	" " " " " " "
Palouse Jack,	" 3245	" " 1001	W. $\frac{1}{2}$ SE. $\frac{1}{4}$	" " " " " " "
Fisher,	" 3251	" " 1010	E. $\frac{1}{2}$ NE. $\frac{1}{4}$	" " " " " " "
Young Bones	" 3247	" " 1002	E. $\frac{1}{2}$ SW. $\frac{1}{4}$	" " " " " " "
Lean,	" 3250	" " 1005	W. $\frac{1}{2}$ NE. $\frac{1}{4}$	" " " " " " "
Young Charley	" 3246	" " 1013	E. $\frac{1}{2}$ SE. $\frac{1}{4}$	" " " " " " "
Toch-i-toch-ite	3253	" " 1011	N. $\frac{1}{2}$ NE. $\frac{1}{4}$	" " " " " " "
William,	Hd. 3243	" " 999	E. $\frac{1}{2}$ NE. $\frac{1}{4}$	NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and Lot 7, Sec. 19, T. 13 N., R. 37 E.

These lands are all within the limits of the withdrawal upon the filing of the map of general route of the main line of said road, viz: August 13, 1870, and are within the primary or granted limits upon the definite location of the road opposite these lands, the map showing which was filed October 4, 1880.

It appears that these Indians had settled upon these lands long prior to the withdrawal of 1870, and are living apart from the tribe to which they formerly belonged.

If their settlements and occupation were authorized by law, then there would be no question but their claims served to defeat the grant, but I fail to find any legislation authorizing settlement or conferring the right of entry under the public land laws, upon Indians having severed their tribal relations, until the passage of the act of March 3, 1875 (18 Stat., 420).

These Indians were members of the Palouse tribe, which was one of the bands with which the treaty of June 9, 1855 (12 Stat., 951), was made, the whole being treated with under name as the "Yakimas."

This treaty was ratified in 1859, and by its terms a permanent reser-

vation was set apart, and one year was allowed the Indians to remove thereto.

It is plain then that their continued occupation of the lands in question was without the protection of law after 1860.

They claim to have settled upon the particular tracts for which they have made homestead entries in 1864 or 1865, which settlements they have continued.

Under the sixth section of the act of July 2, 1864 (13 Stat., 365), a legislative withdrawal attached upon the filing and acceptance of the map of general route, viz: August 13, 1870, the object of which was "to preserve the land unincumbered until the completion and acceptance of the road." 139 U. S., 18; *St. Paul and Pacific v. Northern Pacific*.

While it is true that these Indians were in possession of these lands at the date of the filing and acceptance of the map of general route, yet such occupation was unauthorized and the fact that the homestead privilege was subsequently conferred upon Indians, native born, who had severed their tribal relations, will not protect them in their occupation of the lands in question, as against the grant for said company.

I find, however, among the papers forwarded, a letter from W. K. Mendenhall, resident attorney for the company, addressed to your office, in which he states: "I am authorized by the company to say that upon decision of your office in its favor and a request from you for relinquishment of the lands under the act of 22nd June, 1874, it will make such relinquishment."

As no patent has issued to the company for these lands, its simple waiver of claim is sufficient, and I have to direct that these entries be examined for patent and the company advised of its right of selection in lieu of these lands as provided for in said act of June 22, 1874 (18 Stat., 194).

RESERVOIR LANDS—SETTLEMENT.

KYES v. MCGINLEY.

One who knowingly enters and occupies the lands opened to settlement by the act of June 20, 1890, prior to the time fixed therefor, is disqualified thereby as a claimant for lands under said statute, though outside of the boundary when said lands were open to settlement.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (E. M. R.)

This case involves lots 1, 2, and 3, of Sec. 1, T. 38 N., R. 6 E., Wausau land district, Wisconsin.

The record shows that Patrick McGinley made homestead entry of the above described tract, December 20, 1890, together with the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of the same section.

Charles E. Kyes claimed the land in issue by reason of prior settlement.

December 26, 1891, the local officers rendered their decision wherein they held for cancellation that portion of the entry of Patrick McGinley conflicting with the settlement of Charles E. Kyes, and set out as lots 1, 2, and 3 of Sec. 1.

Upon appeal, your office decision of July 15, 1892, sustained the finding of the local officers, and further appeal was taken to this Department, where it is to be now finally adjudicated.

The evidence shows that Patrick McGinley made homestead entry for the land described, at the land office, on Saturday, December 20, 1890, shortly after nine A. M., and on the 29th or 30th of December, he commenced to work upon the land and built a house. His residence has been continuous ever since.

The contestant, Charles E. Kyes, made settlement upon the land immediately after twelve o'clock on the morning of December 20, 1890, and he, also, has made valuable improvements upon the land and erected a house. His residence, like that of the entryman, has been continuous. It appears, from his recital of how he arrived at the land, that he

came from Hazelhurst on the 19th of December and went across Hazelhurst Lake; then went up on the section line between section 1 and 2 in T. 38, R. 6 E., and then further up the section line between 35 and 36 in T. 39, R. 6, about eighty rods; then I retraced my steps to where a trail crosses that section line between section 1 and 2, in T. 38, R. 6, and I followed that trail to lot 4, section 1, and went on Lake Tomahawk, and then I went on Sec. 6-38-7, and near the range line where I camped.

In going up the section line between sections 1 and 2, R. 6 E., and going up eighty rods further on the section line between 36 and 35 in T. 39 N., R. 6 E., and in retracing his steps to the trail and crossing lot 4 in Sec. 1, Kyes was upon Wausau reserve lands, and the contention is that this entry disqualified him as a homesteader upon these lands.

The reservoir lands were opened for settlement by the act of Congress of June 20, 1890 (26 Stat., 169), section 3 thereof being as follows:

That no rights of any kind shall attach by reason of settlement or squatting upon any of the lands hereinbefore described, before the day on which such lands shall be subject to homestead entry at the several land offices; and until said lands are opened for settlement, no person shall enter upon and occupy the same, and any person violating this provision shall never be permitted to enter any of said lands or acquire any title thereto. This act shall take effect six months after its approval by the President of the United States.

The acts of Congress which opened the Oklahoma lands to settlement were those of March 1, and 2, 1889, together with the proclamation of the President of March 23, 1889. The act of March 1, 1889 (25 Stat., 757-759), contains in the second section the following:

That the lands acquired by the United States under said agreement shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified

claimant. And the provisions of section twenty-three hundred and one of the Revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress, shall not be permitted to occupy or to make entry of such lands or lay any claim thereto.

And the act of March 2, 1889 (25 Stat., 980), adds:

And provided further, That each entry shall be in square form as nearly as practicable, and no person be permitted to enter more than one quarter section thereof, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

The President by his proclamation aforesaid, also stated:

Warning is hereby again expressly given, that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the twenty-second day of April, A. D., eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any right thereto; and that the officers of the United States will be required to strictly enforce the provisions of the act of Congress to the above effect.

These several acts, together with the proclamation of the President, have been construed by the supreme court in the light of the object of Congress, and Justice Brewer, in delivering the opinion of the court in the case of *Smith v. Townsend* (148 U. S., 490), discussed at length the intent and purpose of Congress, and the ills it proposed to cure by this legislation.

Following the interpretation therein placed upon the statutes, this Department in the case of *Turner v. Cartwright* (17 L. D., 414), held that, "One who is within the Territory of Oklahoma at noon, on April 22, 1889, is, by his presence in said Territory, disqualified to enter lands therein."

And in *Dereg v. McDonald* (17 L. D., 364), it was said:

One who enters upon the reservoir lands restored to the public domain by act of June 20, 1890, prior to the time fixed therefor, and remains thereon until said lands are subject to settlement, is disqualified as a settler under said act.

And further, on page 366, it was said:

The inhibition contained in the third section of the act opening the water reserve lands to settlement, is as strict as that under which the above case (that of *Smith v. Townsend*) was determined, and the doctrine laid down is as binding upon the case now at issue as one involving lands in Oklahoma.

So far the disqualification applied only to those who were in the Territory at the hour or date of opening, but subsequently, in *Box v. Dammon et al.* (18 L. D., 133), it was held, *inter alia*:

One who purposely enters upon the reserved lands restored to the public domain by act of June 20, 1890, prior to the time fixed therefor, and goes upon the tract subsequently selected, is thereby disqualified from making homestead entry of said lands though outside of the boundaries when said lands were opened to settlement.

The case now under consideration is similar to the one just quoted, except that Kyes did not go upon the tract he subsequently selected,

but he was in the immediate vicinity of the land involved, and there is no difference of principle between this case and that of *Box v. Dammon*, *supra*. He had entered and occupied, knowingly, the reserve lands, and in doing so, he became disqualified under the circumstances of this case.

It follows, therefore, that your office decision of July 15, 1892, was in error, and the same is hereby reversed.

PRE-EMPTION ENTRY—REINSTATEMENT.

JOSEPH CRAWFORD.

A pre-emption entry erroneously allowed of land withdrawn for the benefit of a private grant, and thereafter canceled for conflict with said grant, can not now be re-instated, though the land covered thereby is not included within the limits of the grant as finally adjudicated.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (W. F. M.)

On May 9, 1831, Joseph Crawford made pre-emption cash entry, under the act of May 29, 1830, of the NW. $\frac{1}{4}$ of section 26, township 9, range 2 east, within the land district of New Orleans, Louisiana, and certificate was issued therefor on that date.

On September 18, 1844, the entry was canceled for supposed conflict with the Houmas grant.

In the case of *Slidell et al. v. Grandjean*, and other cases consolidated therewith, decided by the supreme court of the United States in 1884, and reported in 111 U. S., pp. 412-440, it was held that the Houmas grant extended to only eighty arpents in depth from the Mississippi river, and the land involved in the entry under consideration lies outside the limits of the grant as finally determined by that decision.

On December 22, 1891, Louis Geismar, through his attorney at law and in fact, J. L. Bradford, presented an application or petition to your office, alleging himself to be the owner, by mesne conveyances, of the land in question, and asking for the re-instatement of Crawford's original entry, and the issuance of patent.

This action was taken in view of the supposed removal of all obstructions to the entry by the decision of the supreme court, *supra*, and in further view of the restoration of the lands to the public domain by the act of March 2, 1889, entitled "An act to restore to the public domain and to regulate the sale and disposition of certain lands east of the Mississippi river in the State of Louisiana."

Geismar now prosecutes an appeal from the decision of your office denying his application for the re-instatement of the entry "for the reason that the act of March 2, 1889, prescribes that these lands, thus restored to disposition, shall be disposed of only under the homestead

act, and that the applicant for its benefit must be an actual settler for purposes of cultivation."

In the opinion of the supreme court in the case of *Slidell v. Grandjean*, *supra*, an exhaustive history of the Houmas grant is given, from the date of its creation by the governor of the then Spanish province of Louisiana to the date of the decision itself, and we may confidently look to that opinion for all the facts necessary to be noticed here.

From that source it is ascertained that on January 14, 1829, the surveyor-general of Louisiana addressed a communication to the Commissioner of the General Land Office, together with a plat of the Houmas grant, showing its locality and the extent of the land claimed, suggesting its interference with other grants of the Spanish government, and asked for instructions to guide him in making the survey upon which, with his surveying force, he was then engaged.

To this communication, (says the supreme court, the Commissioner of the General Land Office replied, under date of February 17th, 1829, expressing the opinion that the grant made by Galvez in 1777 was so vague in its terms, both as to boundary and quantity, that it would be indispensably necessary for courts of justice to interfere for the purpose of defining and designating both; that the claim set up to all the vacant land which might be embraced between the northern and southern boundaries of the original grant, if it were extended in the course called for, led to such absurdities, that he thought it impossible that the courts could sanction it; that the object for which the grant was asked and obtained would, therefore, be the leading consideration on which the courts would probably decide the question; and, in so deciding, they might possibly confine the grant either to the limits of the survey actually made by Andry, or to eighty arpents, the usual extent granted when the front grant was deficient in timber, or to the distance of one league and a half, as requested in the petition; and, that, if this last limitation was adopted, full scope would be given to the court to exercise its discretion; and, if the grant could be adjudged to exceed these limits, it must extend to the utmost boundary of Louisiana. He, therefore, decided that a league and a half should not be open to entry, and gave instructions accordingly. Lands beyond that depth were, therefore, treated as public lands, and numerous entries of them were made at the district land office.

It will be observed from the foregoing that only lands beyond the depth of a league and a half from the river were thereafter, until the courts should decide the question, to be treated as public lands, and those within that depth were, pending such decision, reserved from entry.

From an examination of the surveys, plats, and field notes thereof, filed October 31, 1830, it is found that the NW. $\frac{1}{4}$ of section 26, township 9 S., range 2 E., lies within the reserved area, and it accordingly follows that the entry by Joseph Crawford of that tract on May 9, 1831, was improperly allowed, and having been canceled in September, 1844, can not now be re-instated.

The decision of your office is, therefore, affirmed.

SWAMP LANDS—RES JUDICATA—TRANSFEREE.

LABRIE ET AL. v. CONGER.

The failure of the State to appeal from an adverse decision of the General Land Office, as to the character of a tract of land claimed under the swamp grant, is conclusive as to the rights of the State and parties claiming thereunder who had not disclosed their interest.

Secretary Smith to the Commissioner of the General Land Office, June 18, (J. I. H.) 1894. (C. W. P.)

I have considered the case arising upon the appeal of George C. Conger, in the case of Kate Labrie and others against George C. Conger, from your office decision dated January 26, 1893, holding for cancellation his homestead entry of the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 10, T. 28 S., R. 13 W., Roseburg land district, Oregon.

It appears that the land in controversy was selected by the State of Oregon, as swamp land under the swamp land grant, and reported to your office as such, January 14, 1873.

October 13, 1888, this land was determined to be dry land, and not subject to the claim of the State under its grant, by a joint commission of special agents, appointed on the part of the United States and the State of Oregon, respectively. Upon this report the Commissioner of the General Land Office, October 31, 1889, held for rejection the claim of the State, subject to appeal. No appeal having been filed, the claim was finally rejected March 15, 1890.

Afterwards, on August 17, 1891, the plaintiffs herein, as the heirs of one Thomas Beale, filed certain affidavits claiming that said land was purchased by the said Thomas Beale from the State of Oregon, and applying for a hearing.

On September 25, 1891, your office ordered a hearing before the local officers. Testimony was taken, and the register rendered a decision in favor of the plaintiffs, and recommended the cancellation of the homestead entry of the defendant. The receiver declined to express an opinion, on the ground that he had appeared as one of the attorneys in a case in the circuit court of Coos county, Oregon, wherein the land in controversy was involved. On appeal, your office affirmed the decision of the register. The case is now before the Department on the appeal from the judgment of your office.

There are nine specifications of error, but in the view which I take of the case, it is only necessary to recite the first and second errors assigned.

1. In holding that the decisions of October 31, 1889, and March 15, 1890, rejecting the claim of the State of Oregon to this land, were, or could be, properly vacated, after the same had become final, for want of appeal.

2. In not holding that, the claim of the State having been rejected in a decision which became final on March 15, 1890, and Conger having

settled on said land and applied to enter the same on the strength of said decision, it was error to have reinstated the claim of the State, and ordered a hearing upon the imperfect showing made by the swamp claimants herein.

I am of opinion that these objections to the judgment of your office are conclusive. The State of Oregon having been afforded an opportunity to appeal from the decision of the former Commissioner of the General Land Office, rejecting its claim to the land in controversy, the decision became final, and the State could not thereafter be heard to allege that the land in controversy was not of the character of land determined by the judgment of the then Commissioner—still less can the transferee of the State, unless such transferee has made known his interest in the land before the decision has become final.

In *ex-parte* State of Oregon (3 L. D., 334, *Ib.*, 440, 5 *Id.*, 31), where the Commissioner of the General Land Office rejected the claim of the State of Oregon to such lands as were reported not swamp and overflowed, the decision of the Commissioner was affirmed by the Secretary of the Interior, holding that the State having acted under a modified plan, it was competent for the Commissioner to adjudicate the character of the land upon the report of the agent, made in pursuance thereof, and that the State was estopped from re-opening the case, and submitting testimony touching the character of the land, as provided for by the original agreement. To this decision, the State filed a motion for review, which was refused and the former decision affirmed. Afterwards a second motion for reconsideration of said decision was filed by the State, and it was held that "the final decision of the head of a department is binding on his successor," and a reconsideration was refused.

Counsel for the plaintiffs have cited the decision of the Department in *ex-parte* Florida (14 L. D., 175), and rely upon the ruling therein as decisive of this objection, but that case is not in point, for the reason that the claim of the State of Florida was rejected on the report of a special agent of the Land Office alone. Nor is the case of the State of Wisconsin *v.* Wolf (8 L. D., 555) in point. That case decided simply that the finding of a commission appointed by the State and the government, that a tract of land is of the character granted, does not preclude the Department from reviewing such finding, or resorting to other evidence in order to determine the true character of the land.

Upon the second question—this grant was made to the respective States, and the Department does not, in adjudicating claims thereunder, recognize the transferees of those States. State of Illinois (10 L. D., 121). But in *ex-parte* L. B. Applegate (14 L. D., 511), it was held that a transferee, under the swamp grant, who has given notice to the Land Department of his interest, is entitled to receive notice of subsequent proceedings affecting the validity of his title. But it can not be, that he is entitled to greater consideration than other transferees, and

it is established by the decisions of the Department that a transferee is bound to know the status of the land at the date of his purchase, and a transferee who has not made known his interest, can not plead want of notice. Cyrus H. Hill (5 L. D., 276); Van Brunt *v.* Hammon (9 L. D., 561); John J. Dean (10 L. D., 446); Charles C. Ferry (14 L. D., 126).

For these reasons, the judgment of your office is reversed, and the petition of Kate Labrie and others for a hearing is denied and dismissed.

TIMBER CULTURE CONTEST—MOTION FOR REVIEW.

McKEAN *v.* GORDON.

No rights are acquired under a contest filed after a departmental decision canceling the record entry, though the time allowed for filing a motion for the review of said decision has not expired when the contest is filed.

An application to enter, filed with such a contest, but not accompanied by the required affidavit as to the qualifications of the applicant, or a tender of fees, is not sufficient to reserve the land as against the subsequent application of another.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (F. W. C.)

I have considered the appeal by Anderson A. McKean from your office decision of October 22, 1892, sustaining the action of the local officers in dismissing his contest against the timber culture entry of one Fannie Tucker, covering the E. $\frac{1}{4}$ SW. $\frac{1}{4}$ and lots 3 and 4, Sec. 31, T. 2 N., R. 47 W., Akron land district, Colorado, and rejecting his application to make homestead entry of said land, which application accompanied the contest.

On February 7, 1885, Fannie Tucker made timber culture entry of said land, against which one Henry Arnold initiated a contest June 25, 1888, resulting in departmental decision of March 30, 1892, which sustained the contest and ordered the cancellation of said entry.

April 15, 1891, acting under said decision, your office canceled Tucker's entry and advised the local officers.

During the pendency of said contest, to wit, on October 25, 1888, Lewis E. Gordon filed a second contest, and after the cancellation of Tucker's entry, Gordon filed Arnold's waiver of preference right of entry, and on May 10, 1892, he was permitted to make homestead entry No. 459, which is still of record.

McKean's claimed right is based upon an affidavit of contest against Tucker's entry, which affidavit was filed on April 21, 1892, accompanied by an application to enter the land under the homestead laws.

It will be seen that said contest was filed nearly two months after the decision of this Department upon Arnold's contest, under which Tucker's entry was ordered canceled, and McKean admits that he believed

that the entry by Tucker would be canceled on Arnold's contest, but, as it was well known that Arnold had exhausted his rights and that Gordon had not filed an application with his contest, he took this means of securing a prior right of entry in the land in question.

He claims that, as the time for filing a motion for review of said departmental decision had not expired, the contest was properly received and that he should be accorded a preferred right under his application which accompanied his affidavit of contest.

It is well settled by the repeated rulings of this Department that the cancellation of an entry takes effect as of the date of the decision ordering the same, and that the formal entering of the order upon the records, is but a ministerial act which, when made, takes effect, by relation, as of the date of the judgment.

Even had a motion for review been filed, which was not the case, it would not have operated to reserve the land after the order of cancellation. *Wilmarth v. Laybourne* (13 L. D., 182).

No rights could therefore have been acquired under McKean's contest, and the same was properly dismissed.

With said contest, a formal homestead application was filed, not accompanied by the required affidavit showing the qualifications of the applicant, or a tender of fees.

This is the report of the local officers, and the affidavit made by McKean is not sufficient to show to the contrary.

Said affidavit is as follows—

That when he filed the said contest before the local office at Akron, Colo. he filed the same in good faith and for the purpose of securing said land for a home for himself and family and that said contest was accompanied by an application to enter said tract of land with affidavits showing applicant to be a qualified entryman in all respects, the said affidavit having been made out on one of the regular blanks provided by the rules and regulations of this department and also by a non-mineral affidavit. That said contest was filed by one of his attorneys herein H. H. Barnes as affiant is informed and believes and so states the fact to be. (sic)

Said application was not sufficient to reserve the land, and was no bar to Gordon's entry on May 10, 1892.

It appears that no action was taken by the local officers on McKean's contest until July 7, 1892, when it was dismissed, and he was so advised by registered letter of July 11, 1892.

While I can see no cause for such delay, yet no rights can be afforded McKean against Gordon for that reason.

From a careful view of the whole matter, I affirm your office decision, and Gordon's entry will remain intact upon the records.

PRACTICE—COSTS—TESTIMONY.

TAYLOR v. FOOTE.

Local officers, before whom testimony is being taken, may summarily stop obviously irrelevant questioning; or, in their discretion, allow the examination to proceed at the sole cost of the party making the same.

Rule 55 of Practice requires each party to pay the costs of taking the testimony of his own witnesses, both in the direct and cross-examination of such witnesses.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (J. L.)

I have considered the appeal of Frank E. Taylor, from your office decisions of May 9, and September 28, 1892, in the case of Frank E. Taylor v. Glorvina E. Foote reversing the decision of the local officers, and awarding the land in controversy to Mrs. Foote, and overruling Taylor's motion for a rehearing of the case.

The land involved is the SW $\frac{1}{4}$ of Sec. 32, T. 23, N. R. 20 E., W. M., Waterville land district, Washington.

The record shows the following case:

On April 26, 1890, Taylor filed his pre-emption declaratory statement No. 2442, for said land, alleging settlement on April 23, 1890.

On April 30, 1890, Lottie Riker filed her pre-emption declaratory statement No. 2446 for the same land, alleging settlement on April 28, 1890.

On May 20, 1890, Glorvina E. Foote filed her pre-emption declaratory statement for the same tract, alleging settlement on April 14, 1890.

On December 29, 1890, Mrs. Foote offered final proof. Taylor appeared, filed a written protest, cross-examined Mrs. Foote, and procured a continuance of the hearing of his protest until January 5, 1891; at which time both parties being present with their attorneys and witnesses, the hearing was had.

On January 20, 1891, the local officers rendered their joint decision recommending that Mrs. Foote's final proof be rejected and that her declaratory statement be canceled, and that Taylor's declaratory statement remain intact.

Mrs. Foote appealed to your office.

On May 9, 1892, your office reversed the decision of the local officers, awarded the land to Mrs. Foote, accepted her final proof, and directed that the declaratory statements of Frank E. Taylor and Lottie Riker be held for cancellation.

On June 29, 1892, Taylor filed a motion for a rehearing of the case for errors apparent on the face of the record, and also on the ground of newly discovered evidence, and filed sundry affidavits in support thereof.

On September 28, 1892, your office denied said motion; and Taylor has appealed to this Department.

One ground of error assigned by the appellant is that he, the pro-

testant, should have been, and was not, allowed to cross-examine Mrs. Foote and her witnesses at her expense.

On December 29, 1890, Taylor cross-examined Mrs. Foote at will. On January 5, 1891, the local officers properly checked Taylor's cross-examination of Mrs. Foote in accordance with rule of practice 41; and in the exercise of their discretion under rule of practice 56, they offered to allow said cross-examination to proceed at the sole cost of Taylor, on condition that he deposit the further sum of ten dollars to pay the costs thereof. The action of the local officers in this behalf is approved.

But it appears that the local officers refused to permit Taylor to cross-examine at will William Stedman and William H. Milliken, two witnesses for Mrs. Foote, solely because Taylor failed or refused to deposit money to cover the costs of such cross-examination. This action was erroneous. Since May 29, 1890, rule of practice 55 has been construed by this Department to mean, that each party must pay the costs of taking the testimony of his own witnesses, both in the direct and the cross-examination of such witnesses. (*Milum v. Johnson*, 10 L. D., 624; *Duclos v. Harksen*, 11 L. D., 388, and *Townsite of Orlando v. Hysell and Ransom*, in Land Office Report 1891, page 180.)

Therefore, your office decision is hereby reversed, and a rehearing of the whole case is allowed. Your office will give the necessary directions.

OKLAHOMA LANDS—FRAUDULENT ENTRY.

WHITE *v.* MARVEL.

An entry of Oklahoma land made through the assistance of another, who enters the Territory in violation of law and holds the land until such time as the claimant makes entry thereof, is illegal, and must be canceled.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (W. M. W.)

I have considered the case of Charles White *v.* William A. Marvel, on the appeal of the former from your office decision of July 18, 1892, dismissing the appellant's contest against the homestead entry of said Marvel for the NW. $\frac{1}{4}$ of Sec. 27, T. 13 N., R. 1 W., Oklahoma City land district, Oklahoma.

The record shows that on May 1, 1889, Marvel made homestead entry for the tract.

On July 29, 1889, White filed his affidavit of contest against said entry, charging (1) that Marvel was disqualified to make said entry, by reason of having entered the Territory of Oklahoma prior to 12 o'clock, noon, of April 22, 1889, and after March 2, 1889; and (2) that he procured another person to enter said Territory between said dates and occupy and hold said tract for his benefit, to the exclusion of all other persons.

A hearing was ordered and had upon these charges, at which the parties appeared and introduced their testimony.

On December 14, 1891, the register and receiver rendered their joint decision, in which they found that:

It appears undisputed, that the entryman was in the Oklahoma country about the 24th of March, 1889, and crossed this tract of land; it is not shown that he was then in the pursuit of any legitimate calling or business which required his presence in the country.

It is further shown that a son of the defendant came into the country during the day previous to the settlement of the country, and remained in it until noon of April 22, 1889; that he went upon this tract before noon, and held the same until his father reached the same from the line after noon, when the son permitted the father to take possession of the same, which he did and laid claim to said tract, and began his settlement on said day, which settlement he has maintained by residence, improvement and cultivation. It is denied by the father and son, that any understanding was previously had, or agreement made, whereby the son was to hold said claim for the father. Notwithstanding these denials, from declarations made by the parties, and the facts and circumstances connected with said transaction, we are clearly of the opinion that the son entered upon said tract prior to the time permitted by law, and held the same, with the knowledge of his father, and that the father knowingly took the benefit of his said acts and ratified the agency alleged.

We therefore find that the contestant has established both the charges contained in his contest affidavit, and that the defendant is disqualified under the law from acquiring title to said tract.

In the decision appealed from, your office reversed the finding of the local officers on both the grounds charged in the affidavit, and dismissed the contest.

The appeal substantially alleges that your office decision was erroneous in its findings of facts, and conclusions of law.

In view of the conclusion I have reached, from a careful examination of the testimony and record in the case, it is not necessary to pass directly on the first charge contained in the affidavit of contest, further than to incidentally refer to a few facts connected with it.

As to the second charge, it appears that a son of the entryman went into the Territory on the night of April 21, 1889, and before 12 o'clock, noon, of the next day, April 22, was on the land; that he started from the place where his father was camped; that he went into the Territory ostensibly for the purpose of procuring land, and then passed over or near to the land in controversy.

When the entryman entered the Territory, he traveled along a way that had been blazed out by some one, leading directly towards the land in controversy. He appears to have gone directly to where his son was on the tract, and remained there that night, and continued to remain on or about it until he made entry for it. His son claimed the tract as against other claimants, until about the time Marvel made his entry for the same.

Notwithstanding the fact that Marvel and his son testified there was no pre-arrangement or understanding between them that the son should enter the Territory in advance of the time fixed by law, and the procla-

mation for opening it to settlement, and hold the land for his father, their declarations, testified to by witnesses at the trial, and their acts, relations and the circumstances, all tend strongly to show that there was such an agreement before the day of opening, and that the son entered the Territory pursuant thereto, and carried out such agreement.

It was held in *Blanchard v. White et al.* (13 L. D., 66):

That the disqualification imposed by the statute, extends to an applicant who remains outside of said Territory until noon of April 22, 1889, but seeks to evade the prohibitory operation of the statute through the assistance of another whom he has heretofore employed to enter said Territory for such purpose.

And in *Guthrie Townsite v. Paine et al.*, on review, (13 L. D., 562) Secretary Noble held that:

A settler on Oklahoma land cannot evade the prohibitory effect of the statute, with respect to entering said Territory, through the assistance of one who enters the same prior to the time fixed therefor.

I think this principle is applicable to the case at bar, for I can see no reason why it should not be applied to an entryman as well as a settler. In other words, if a settlement claim made through the assistance of one who enters the Territory prior to the time fixed by law, is invalid, I see no reason why an entry made through such assistance should not likewise be held invalid.

There can be no question but what the entryman's son entered the Territory in violation of the statute and proclamation; went upon the tract involved, and held it against all other claimants until such time as the father was enabled to make entry of it; that the father, with full knowledge of said illegal acts of his son, made the entry in question as the result of, or flowing from such illegal acts. His entry having been made through the assistance thus rendered, is illegal, and must be canceled.

For the foregoing reasons, your office decision of July 18, 1892, is reversed, and Marvel's entry will be canceled.

SIoux HALF BREED SCRIP—SECTION 7, ACT OF MARCH 3, 1891.

ELIZABETH LABATHE.

A purchaser of land covered by a Sioux half breed scrip location, made under a power of attorney that is in effect an assignment of the scrip, who invokes the confirmatory provisions of section 7, act of March 3, 1891, is charged with notice that said scrip is not assignable under the law, and is therefore not a *bona fide* purchaser within the terms of said section.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (G. B. G.)

On November 24, 1856, Sioux half breed scrip No. 339, letter "A", issued to Elizabeth Labathe. On November 4, 1864, a duplicate of said scrip was issued, and on February 11, 1867, said duplicate scrip

was located at San Francisco, California, by Wm. S. Chapman, attorney, for the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 35, T. 17 N., R. 17 W., and patent issued for the land August 10, 1867.

On October 3, 1883, James Whalen, attorney in fact, filed the original piece of said scrip, for a tract of forty acres of unsurveyed land, which filing, after the official survey of the land, was adjusted to the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 15, T. 153 N., R. 67 W., Devil's Lake land district, North Dakota.

On November 15, 1892, your office, by letter of that date, held that the aforesaid location made with the original scrip, was of no effect and void, and held the same for cancellation.

Motion for review and reconsideration of said office decision was filed by F. M. Heaton, attorney for one D. L. Wilbur, alleged purchaser of the land in controversy, and relief asked, under the confirmatory provisions of section seven of the act of March 3, 1891.

This was denied by your office on February 24, 1893, by decision of that date, from which decision the said Wilbur has appealed to the Department, and assigns as errors:

1st. "It was error to hold that said location did not come under the head of a pre-emption, and"

2d. "It was error to hold that said location was not confirmed under the act of March 3, 1891."

Section seven, of the act of March 3, 1891 (26 Stat., 1095-1098), provides *inter alia* that

All entries made under the pre-emption, homestead, desert land, or timber culture laws, in which final proof and payment may have been made, and certificates issued, and to which there are no adverse claims, originating prior to final entry, and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry to bona fide purchasers or incumbrancers, for a valuable consideration, shall, unless upon investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented, upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.

In adjusting the rights of a *bona fide* purchaser, for a valuable consideration, under section seven, of the act of 1891, *supra*, fraud against the government on the part of the entryman can not be considered to such purchaser's disadvantage, the statute in express terms restricting such inquiries to "fraud on the part of the purchaser." Furthermore, for the purposes of this inquiry, it may be conceded that the location of Sioux half breed scrip on land, after substantial improvements have been made thereon, as in this case, is an entry, "under the pre-emption . . . laws," that the land in controversy had been sold, "for a valuable consideration," "prior to the first day of March, eighteen hundred and eighty-eight, and after final entry," and that "satisfactory proof" has been presented "to the land department of such sale."

It follows that the case stands on the *bona fides* of the purchaser.

The aforesaid duplicate scrip having been previously located on other

land, for which patent has issued, the claim of Labathe against the government had been satisfied, and the location of the original scrip was a fraud against the government. But of such fraud, there is no evidence that the purchaser was cognizant, and the rights guaranteed to him by the express letter of the act of 1891, *supra*, could not be adversely affected thereby. But there is a feature of the record fatally defective to his claim, of which he can be charged with notice.

On August 6, 1880, Elizabeth Labelle executed to the aforesaid James Whalen a power of attorney "to select and locate at any land office in the United States" the lands to which the said Labathe was entitled, by reason of said scrip.

On the same date, Cyrille Labelle and Elizabeth Labelle (formerly Elizabeth Labathe) executed to the said Whalen another power of attorney, "to enter into and upon, and take possession of any and all pieces and parcels of land, or the timber and other materials thereon, in the Territory of Dakota," which they then owned, or which they might thereafter "acquire or become seized of," or in which they were at that time or might thereafter "be in any way interested, under and by virtue of location of said scrip." And said instrument further authorized said attorney "to grant, bargain, sell, demise, lease, convey and confirm said land."

Further power is given to "said attorney to appoint a substitute, or substitutes, to perform any of the acts which our said attorney is, by this instrument, authorized to perform, with the right to revoke such appointment at pleasure." And for and in consideration of the sum of \$40, the receipt whereof is acknowledged, said attorney was irrevocably vested with the powers thereinbefore granted, and the right to revoke any of the said powers renounced, and all "claim to any of the proceeds of any sale, lease or contract, relative to said land or timber, or material thereon," released.

This instrument is essentially a conveyance, and was intended to operate as such, and at the same time evade the inhibition of law against the assignment of Sioux half breed scrip.

"A location of Sioux half breed scrip by one acting in his own interest, and not for the half breed, is in violation of the statute under which the scrip issued." *Allen et al. v. Merrill et al.* (on review), 12 L. D., 138.

The appellant purchased the land in controversy from Whalen, evidenced by indenture of date October 3, 1883. This conveyance is executed by Whalen, as attorney in fact for Elizabeth and Cyrille Labelle.

Final certificate of location issued on February 28, 1884, and on March 24, following, the said Whalen, attorney, executed to the appellant another deed for the same land, presumably for the purpose of adjusting the premises of the deed to the lines of the land, as defined by the public surveys.

It appears further, that on July 18, 1884, the said Elizabeth and Cyrille Labelle, in their own proper persons, executed to the appellant a quitclaim deed to the land, the consideration expressed therein being fifty dollars, in hand paid.

These two last-named conveyances were but a reaffirmance and completion of the former sale, and, it is apparent, were executed for the purpose of evidencing a sale "after final entry," and the last one especially, in my judgment, was executed for the further purpose of curing a fatal defect in the purchaser's title.

While it does not appear that there has been any positive fraud on the part of the purchaser, he is chargeable with notice that the scrip located on the land purchased was not transferable or assignable under the law, and did not, and could not, belong to the locator, and that therefore his vendor had no right, title or interest in the land conveyed.

There is abundant evidence of bad faith on the part of the purchaser, and his application for the confirmation of the entry is denied.

For the reasons hereinbefore stated, the decision appealed from is affirmed.

PRACTICE—REHEARING—ACT OF JUNE 3, 1878.

MARTIN v. BARLOW.

A motion for review should definitely set forth the grounds on which a reconsideration of the case is desired.

In the absence of prejudice shown, it is no ground for a rehearing that at the time of the trial the statute governing the proceedings received a construction that is no longer followed.

Secretary Smith to the Commissioner of the General Land Office, June 18,
(J. I. H.) 1894. (E. M. R.)

This case involves the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 32, T. 14 N., R. 9 W., Vancouver land district, Washington.

The record shows that on August 10, 1889, John S. Barlow filed his timber and stone application for the above described tract. On September 25, 1889, Herman Martin filed a protest against the acceptance of Barlow's proof, alleging that the land was not "chiefly valuable for timber thereon."

December 10, 1889, hearing was had, and on April 24, 1890, the register and receiver rendered a decision in favor of Martin.

On June 11, 1892, your office reversed the decision of the local officers, and on August 17, 1893, this Department affirmed that finding.

On September 22, 1893, a motion for review was filed on behalf of Martin, and on September 29, 1892, a motion for review and rehearing was filed in the land office, also in his behalf. The case is now before the Department upon the motion for rehearing and review.

The motion for rehearing is based upon the affidavits of Mrs. Louisa Rose, Wm. Axford, John W. James, Louis Johnson, Arthur E. Skidmore, Patrick A. Reilly and Wallace A. Turney. Of these witnesses it appears from the affidavit of Martin that "affiant further states that he used due diligence in procuring the attendance of every witness supposed to know anything about such facts; that he specially endeavored to procure the attendance of said James, said Rose and said Axford, and that he also tried to secure the attendance of the said Johnson urgently, and offered to pay their per diem and expenses at said hearing," etc.

From this it would seem that the witnesses enumerated were known to the protestant at the date of the hearing, and should then have been produced, and the evidence that it is now asserted will be given, is not in the nature of newly discovered evidence as it was known to him at that time. The rules provide for continuances when material witnesses are absent, or for securing their testimony by depositions.

The testimony of Mrs. Louisa Rose and of Arthur E. Skidmore is clearly incompetent on account of the fact that their affidavits show that the testimony which they would give would consist of statements claimed to have been made to them by one John B. Rose, who is dead.

The testimony of Patrick A. Reilly is cumulative.

The affidavit of Turney is incompetent in a motion for review. He sets forth that Crawford admitted to him that he made a mistake in his testimony, but subsequently refused to sign a correction of it. No new trial will be granted in order that a witness may impeach the testimony of a witness of the opposing party.

It will thus be seen that a new trial can not be granted upon the showing thus made. The motion for review filed in the case is too vague and indefinite, inasmuch as it does not set forth the reasons for the alleged errors in the decision and makes no affirmative showing of any errors therein.

Counsel for Martin are in error when they claim, on page 10 of their argument, that "We ask that the rule be applied that holdings of the local officers on the facts must be conclusive where the evidence is conflicting." This Department has never laid down such a rule, and the case cited by counsel does not sustain that position. The rule is that the concurring decisions of your office and the local office will be regarded as conclusive where the evidence is conflicting.

Subsequently an amendment to the application for rehearing was filed, on the ground that the hearing in the present cause was held on December 10, 1889, and that such hearing was "prior to the announcement of the decision of the supreme court of the United States in the case of the United States *v. Budd et al.* (144 U. S., 154), which was decided on March 28, 1892; that prior to the announcement of that decision proof as to the cost of clearing the land for purposes of agriculture and as to the character and marketable value of the timber

was held to be irrelevant under the rulings of the Department and was excluded from consideration, and that the evidence submitted by applicant at said hearing was subject to said rulings which was subsequently necessarily and radically changed to harmonize with the construction of the law adopted by the supreme court in said case of the United States *v. Budd et al.*, and the applicant further states that before the decision in the said Budd case that rulings of the Department were that land could not be entered under the timber and stone act, unless it should be declared to be 'unfit for cultivation after the timber is removed.' That this rule was well known to him and properly guided litigants in such cases, and was in force and controlling at the time of the hearing of this cause."

I have had some difficulty in reaching a conclusion upon the question raised by this amendment to the motion. It would seem to rest upon better grounds were the applicant the timber claimant. The case of the supreme court cited is a decision that is in favor of the timber claimant. If the motion should be granted it would follow that all cases of a similar nature would come within the rule. It would be to establish a precedent for the granting of new trials in all cases hereafter where rule of construction of law should be changed.

The question at issue at the hearing was the character of the land and the value of its timber. That issue was sufficiently raised under the prior rulings of this Department and the agricultural protestant has not suffered by the change of the rule, however it might be in reference to a timber claimant.

For the reasons stated the decision of this Department of date August 17, 1893, is adhered to, and the motions are dismissed.

SUCCESSFUL CONTESTANT--PREFERENCE RIGHT.

SATTLEY *v.* STATHAM.

A successful contestant cannot be held to be in default in the matter of asserting his preferred right, where he goes to the local office within the statutory period for the purpose of making entry, and is there informed that his application cannot be allowed on account of a pending contest.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (F. W. C.)

I have considered the appeal by Mary A. Statham, from your office decision of January 21, 1893, holding for cancellation her desert declaration covering the E. $\frac{1}{2}$ of Sec. 28, T. 5 N., R. 9 W., Los Angeles land district, California, and awarding to Marshall A. Sattley a preference right to make entry of said land.

On July 29, 1887, one David M. Sutherland made desert declaration

for this land, against which one John C. Hannah filed affidavit of contest January 18, 1890.

Said application to contest was rejected by the local officers, and, on appeal, said action was sustained by your office, and the case was further prosecuted to this Department.

During the pendency of these proceedings, to wit, on July 20, 1890, three affidavits of contest were filed against the desert declaration of Sutherland, each alleging failure to reclaim the land within the statutory period.

These contests were filed by the following persons, in the order named: Marshall A. Sattley, Wm. Sharpless and John C. Hannah.

Hannah afterwards withdrew his second application, stating that he proposed to stand upon his original application to contest.

Nothing further appears to have transpired in the matter of said contests until on January 21, 1891, Sutherland's relinquishment was filed.

Hannah thereupon dismissed his appeal to this Department upon his pending application to contest Sutherland's entry, and on the same day Mary E. Statham made desert declaration for the land. As to whether notice of said cancellation was given the parties applying to contest the entry by Sutherland, the record is silent, but on February 2, 1891, Sharpless requested a hearing for the purpose of showing himself entitled to a preferred right of entry in the land in question, by reason of his contest.

On March 6, 1891, the local officers summoned Sattley, Sharpless and Statham to appear on April 14, 1891, in order that their respective rights in the premises might be determined.

At the hearing, Sharpless failed to enter an appearance and was declared to be in default.

Upon the showing made the local officers were of the opinion that Sattley was entitled to a preferred right of entry by reason of his contest.

Statham appealed, and your office letter "H" of April 13, 1892, remanded the case for the purpose of allowing Sattley an opportunity to establish the charge made in this affidavit of contest.

At the hearing the local officers found that the default existed at the time of the filing of the affidavit of contest, and in this your office decision appealed from concurred, and the entry by Statham was held for cancellation.

The appeal to this Department urges error in your office decision, for the reason that the presentation of Sutherland's relinquishment was not the result of Sattley's contest, and that whatever rights were gained by said contest were lost by his failure to assert his preference right of entry within thirty days from notice of the cancellation.

It is unnecessary to consider whether the presentation of Sutherland's relinquishment was the result of Sattley's contest or not, for the

reason that he has sustained the charge made therein; and the presentation of the relinquishment could not deprive him of his right to make such showing.

Neither does the fact that Hannah had previously applied to contest this entry, his application having been rejected and he having appealed (which appeal was afterwards withdrawn), in any wise affect Sattley's rights.

It is plain then, that Sattley is entitled to a preferred right of entry by reason of his contest, and the only question for consideration is: Has he forfeited such right by failure to present his application as required?

As before stated, the record is silent as to whether notice of the cancellation of Sutherland's entry was given Sattley.

He did not make formal application until April 13, 1891, but he swears that within thirty days from the cancellation of Sutherland's entry, he went to the local office for the purpose of making entry, and was informed that, as Sharpless had applied for a hearing, his application could not be allowed until the hearing had been held.

Under the circumstances, I am of the opinion that Sattley is not in default, and therefore affirm your office decision and direct that, upon completion of entry by Sattley, Statnam's entry be canceled.

OSAGE LAND—PUBLIC SALE—DEFERRED PAYMENTS.

BIGGER v. BROWN.

At a public sale of Osage land the holder of a tax certificate is entitled, within the business hours of the day of such sale, to make the deferred payments, and receive patent thereafter in his own name; and this right cannot be defeated by an unauthorized regulation of the local office requiring tax sale purchasers to furnish official proof of their right to purchase.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (E. M. R.)

The record shows that Henry C. Washburn made Osage entry for the SE. $\frac{1}{4}$, Sec. 3, T. 27 S., R. 18 W., Larned land district, Kansas, April 20, 1886, and made the first and second payments therefor.

By letter "G" of March 11, 1891, a list of Osage entries, including that of Henry C. Washburn, was forwarded to the local officers by your office, with instructions to offer the lands therein mentioned at public sale under the act of May 28, 1880, and the instructions of this Department (14 L. D., 172).

The affidavit shows on behalf of L. A. Bigger that upon the date set for the sale of these lands he was present by his representative, John G. Steffee, and when the land was offered for sale on that day, he notified the register that he was the owner of the tax certificate of the land.

entered by Henry C. Washburn, and that his legal representative then and there offered to comply with the terms of the act and the instructions of this Department, but was refused on the ground that he offered no official proof of the existence of the tax sale certificate, though he stated that he had been informed by wire that it had been forwarded to him and that he expected to receive it during the day.

One Morris, who was the representative of John D. Brown, was present and heard these statements, and insisted upon the land being sold; this was done and Morris purchased it for Brown, paying therefor \$200.

Bigger further states that he is interested in the land to the pecuniary extent of \$100, and that his failure to get the land will result in a total loss to him of the sum just mentioned, and that, as a matter of fact, later in the day, after the land had been sold by the local officers, his representative received the tax certificate by express and presented it to the local officers with an offer of payment which was refused by them for the reason that the land had been sold.

The act of May 28, 1880 (21 Stat., 143), provides in section four as follows:

After the payment of the first installment as hereinafter provided for, such lands shall be subject to taxation, according to the laws of the State of Kansas, as other lands are, or may be in said State: *Provided*, That no sale of any such lands for taxes shall operate to deprive the United States of said lands, or any part of the purchase price thereof, but if default be made in any installment of the purchase price, as aforesaid, such tax sale purchaser, or his or her legal representatives, may, upon the day fixed for the public sale, and after such default has become final, under the foregoing provisions, pay so much of said purchase price as may remain unpaid, and shall thereupon be entitled to receive a patent for the same as though he had made due settlement thereon: *And provided further*, That nothing in this act shall be so construed as to deprive, or impair the right of the settler, of the right of redemption under the revenue laws of the State of Kansas.

Under this act, Secretary Noble issued instructions on February 15, 1892 (14 L. D., 172), in which he says:

Before proceeding to offer each tract, you will endeavor to ascertain by calling out, if a tax sale purchaser of that tract, or his or her legal representative is present; if so, you will allow such party or parties the privilege of paying the balance of purchase money which remains unpaid, and accumulated interest, together with the pro rata share of the expenses of the sale. In all such cases last mentioned the land will not be sold, but you will issue a certificate to the party or parties entitled thereto in their own name just the same as if he were the original settler upon the tract in question, endorsing across the face of such certificate in red ink a reference to the fourth section of the act approved May 28, 1880, as your authority therefor.

The register and receiver in their notices of publication of sale of these lands, state that tax sale purchasers would be required to furnish official proof of their right to purchase under section four of the act above quoted, and this was the occasion of their refusal to allow Steffee, the representative of Bigger, to purchase the land, no such proof having been at the time the land was offered for sale submitted.

The act does not require such proof at the time of the sale. The instructions of Secretary Noble contain no such provision. There

appears to have been no authority granting the register and receiver the right to require such a showing. Secretary Noble says "you will endeavor to ascertain by calling out, if a tax sale purchaser of that tract or his or her legal representative is present." This was the method prescribed by the instructions of the Secretary and this was the method which should have been followed by the local officers.

It is not a necessary conclusion of this statement that any one who claims to be a tax sale purchaser should be allowed the benefits of this section, but it does follow that on the day of such sale, and at any time during the business hours of the day the tax purchaser had the right to redeem the land. This was the right given by the act, by paying the deferred payments, and he was then entitled to receive patent for the land in his own name.

For the reasons stated your office decision of December 5, 1892, is hereby reversed, and the sale to Brown is suspended, and the tax purchaser, Bigger, is given thirty days after official notice of this decision in which to make the deferred payment, and failing to do so in that time, the sale to Brown will be allowed to remain intact, and if he does so within the specified time, such sale will be canceled.

FORFEITED RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890.

JAMES C. DALY (On Review).

The preferred right of purchase accorded by section 3, act of September 29, 1890, to persons in possession of forfeited railroad lands under "license" from a railroad company, can not properly be asserted by one who has not applied to purchase the land from the company, or who does not show any authority from the company to take possession of the land.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (J. L. McC.)

James C. Daly has filed a motion for review of departmental decision of November 3, 1893 (17 L. D., 498), denying his application to purchase, under the act of September 29, 1890 (26 Stat., 496), the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of Sec. 35, T. 3 N., R. 14 E., Vancouver land district, Washington.

The application was rejected for the reason that the applicant was not a *resident* upon the land applied for.

The applicant contends that actual residence is not required by the statute cited. He names a considerable number of persons who have been permitted to purchase lands in the vicinity under said act, who had never resided upon them.

But it is clear that the fact that certain parties, through an improper interpretation or application of the law on the part of the local officers, have been allowed to purchase lands to which they were not entitled,

constitutes no reason why this Department, when its attention is directed to the fact, should countenance its violation.

He transmits a copy of the blank application used at the local office, to be filled out by applicants to purchase. The blank states: "That I settled on said tract of land, which I apply to purchase, on the — day of — 18—;" and quotes from a letter of your office, dated February 28, 1891, which said: "The blank form of application is sufficient for the class of persons provided for in the third section who settled on the lands with the *bona fide* intention of purchasing from the Northern Pacific Railroad Company when it should secure title;" hence he argues that merely settlement is the necessary prerequisite to purchase. This contention is evidently based upon an incorrect apprehension of the meaning of the term "settlement." There could be no such thing as "settlement" disassociated with "residence." Although "settlement" may precede "residence," yet it must be with a view to residence. The going upon or improvement of land, otherwise than with a view to residence "within a reasonable time thereafter" (*McAvinney v. McNamara*, 3 L. D., 553, and many other cases), may be "occupation," but not "settlement." That this interpretation of the term "settlement," as used in section three of the act of September 29, 1890, is correct, is shown by the amendatory act of June 25, 1882, (27 Stat., 59), which provides that said section three "be and the same is hereby amended so as to extend the time within which persons actually residing upon lands forfeited by said act shall be permitted to purchase the same, etc. It was reasonably presumed that any person who had settled upon any tract prior to September 29, 1890 (that is, occupied the same with a view to residence "within a reasonable time thereafter"), would be found "actually residing" thereon by June 25, 1892.

The applicant directs attention to the language of the third section of said act, permitting the purchase of forfeited lands not only by persons who have "settled" thereon, but by persons in "possession" of said lands "under deed, written contract with, or license from, the State or corporation to which such grant was made." He contends that the word "written" applies to "contract," but not to "license;" in other words, that the purchase may be made by one who has possession under a merely verbal license from the railroad company.

The Department has held, in the case of *Eastman v. Wiseman* (18 L. D., 337—syllabus), that the provisions of said section three "extend to one who takes possession of and improves lands under the circular invitation of the company, and in accordance with said circular *applies to purchase* said lands of the company." But Daly does not show, as was shown in the case cited, that he ever applied to purchase the land now in question. In that case the applicant received a postal card informing him that his application had been received, stating (*inter alia*) that *bona fide* settlement, or improvement of such character as

would be evidence of his intention to purchase, was necessary before any right by virtue of *his application* could be obtained; and this postal card was held to be, by implication, a license to take possession of the land. But in the case at bar, the applicant does not produce any such correspondence; he fails to show any license, written, verbal, or by implication, to take possession of the land.

In the absence of any showing of "settlement" or of "written contract," or of "license," expressed or implied, no reason appears for disturbing the decision heretofore rendered.

The motion is overruled.

RIGHT OF WAY—CANALS—STATE CONTROL.

H. H. SINCLAIR ET AL.

The grant of right of way privileges by the act of March 3, 1891, is restricted to purposes of irrigation, hence an application for right of way can not be approved under said act where the water is to be used in generating electricity.

Right of way maps showing the location of a canal wholly on unsurveyed land, will not be approved.

The provisions of said act deal only with the right of way over the public lands to be used for the purposes of irrigation, leaving the disposition of the water to the State.

Assistant Attorney General Hall to the Secretary of the Interior, March 7, 1894. (F. W. C.)

I have the honor to acknowledge the receipt, through the reference of Hon. W. H. Sims, Acting Secretary, of February 28, 1894, of certain papers relative to the claims of H. H. Sinclair and C. G. Baldwin *et al.*, for right of way through the San Bernardino, California, forest reservation, and the right to the use and appropriation of the water of a certain stream running through said reservation.

The reference asks for an opinion "as to whether the Department has authority, under the act of March 3, 1891, to grant right of way through the San Bernardino, California, forest reservation, for the purpose desired by H. H. Sinclair and C. G. Baldwin *et al.*, also what right, if any, Baldwin, Burt *et al.*, acquired under the action taken under the laws of the State of California with a view to appropriating water on unsurveyed government land supposed to be within the said San Bernardino forest reservation."

Section 18 of the act of Congress approved March 3, 1891 (26 Stat., 1095), grants the right of way through government reservations for canals and reservoirs for irrigating purposes, provided that they shall not be so located as to interfere with the proper occupation thereof by the government. The grant made by this act restricts the use of the land over which the right of way is granted, to purposes of irrigation. The applications of Sinclair and Baldwin state that they desire the

use of the water for the purpose of generating electricity to be used in the lighting of certain cities; this is outside of the scope and purpose of the act of March 3, 1891 (*supra*), and, consequently, no approval of any claimed right of way under said act could be granted.

It appears also that these lands are as yet unsurveyed and that if within the scope and purpose of the act, the same can not be approved so as to carry the right of way, as the maps contemplated to be approved under said act are those showing the location of the ditches, canals or reservoirs proposed, in connection with the public surveys, which must be indicated on the maps filed for the purpose of securing the approval of the Secretary of the Interior.

With this view as to the rights of the parties under the act of March 3, 1891, I need not consider the second question as to what rights, if any, Baldwin, Burt *et al.*, acquired by their action taken under the laws of the State of California, with a view to appropriating water upon this reservation, further than to state that by the eighteenth section of said act of March 3, 1891, it is provided that "the privilege herein granted shall not be construed to interfere with the control of water for irrigating and other purposes under the authority of the respective state or territories," which would seem to relegate the matter of appropriation and control of all natural sources of water supply in the state of California to the authority of that state. The act of March 3, 1891, deals only with the right of way over the public lands to be used for the purposes of irrigation, leaving the disposition of the water to the state.

The papers are herewith returned with the opinion that the claimed right of way for the purposes desired, can not be granted under the provisions of the act of Congress invoked by the parties.

Approved,

HOKE SMITH,

Secretary.

MENZEL *v.* VALEAR.*

Departmental decision of February 4, 1893, 16 L. D., 95, reversed on review by Secretary Smith March 28, 1894.

* The action noted above rests on a reconsideration of the facts in the case, and does not involve a modification of the legal principles announced in the former decision.

PRACTICE—APPEAL—MOTION FOR REVIEW—RAILROAD LANDS.

MOORE v. PENTECOST.

Where a decision of the General Land Office is adverse to both parties and one appeals, and the other moves for review, and both actions are regularly taken, the Commissioner may properly consider the motion for review.

If, in such case, the motion for review and the appeal are based on the same grounds of error, the granting of the motion suspends the operation of the appeal, and jurisdiction of the case is with the General Land Office which should pass on the other issues and determine therefrom which of the parties has the superior right.

The case of *Eastman v. Wiseman*, 18 L. D., 337, involving the purchase of railroad lands under section 3, act of September 29, 1890, cited and followed.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (G. C. R.)

On May 18, 1891, Charles N. Pentecost made cash entry No. 4405, for the SW. $\frac{1}{4}$ of Sec. 3, T. 8 N., R. 36 E., Walla Walla, Washington, under the 3d section of the act of September 29, 1890 (26 Stat., 496).

On June 13, 1891, Miles C. Moore applied to purchase the land, claiming the prior right to do so under a license from the Northern Pacific Railroad Company. His application was rejected, for the reason that the land was covered by Pentecost's cash entry.

On September 23, 1891, Moore filed his affidavit of contest against the entry, alleging, substantially, that he entered into possession of the land, settled and improved the same, in the year 1882, under a license from the Northern Pacific Railroad Company, and had maintained quiet and peaceable possession thereof under said license; that the improvements were of the value of \$25; that Pentecost "had no right of purchase of said land, no deed, contract or license therefor, nor had he settled, occupied or improved the same, except with consent of this contestant."

Hearing was had, and the register and receiver decided (April 22, 1892):

1. That Pentecost was a settler on the land on September 29, 1890, and on May 19, 1891 (date of entry), under a license from the Northern Pacific Railroad Company.

2. That he did not forfeit his right to purchase.

3. That he never abandoned his intention to purchase.

4. That on September 29 (1890), he was in exclusive possession of the land, and that Moore had (at least) constructive notice of that possession.

5. That Moore was not in possession of the land under a license from the company on September 29, 1890, or at any other time; and, finally,

That Pentecost's entry should stand and Moore's contest should be dismissed.

On appeal, your office, by decision dated November 10, 1892, reversed

that action, on the grounds solely that the land, being "situated north of the line known as the Harrison line," comes within the purview of the 5th section of the act of 1890, *supra*, and not under the 3d section thereof, and that as neither Pentecost nor Moore was at any time in possession of the land, "claiming the same under written contract with said company," or had acquired title thereto from the company, neither was qualified to make entry thereof under said 5th section of the forfeiture act of 1890, *supra*.

On December 10, 1892 (just thirty days after your said office decision), Messrs. Copp and Luckett, of this city, as attorneys for Pentecost filed a motion for a review of your said office decision, and on January 4, 1893, Moore, through his attorney, Mr. H. C. Moulton, of this city, filed his appeal from said decision.

On January 24, 1893, your office considered the motion for review, and revoked the decision of November 10, 1892, holding that said section 3 of the act of 1890, *supra*,

applies generally to all lands restored by the forfeiture act, and provides for the purchase from the government within two years from the passage of the act of not more than three hundred and twenty acres by any one person at the rate of one dollar and twenty-five cents, (1) by persons in possession of such lands under deed, written contract with or license from the government's grantee or its assigns, executed prior to January 1, 1888, and (2) by persons who have settled on such lands with bona fide intent to secure title thereto by purchase from such grantee when earned by compliance with the conditions or requirements of the granting acts of Congress.

The decision was thus in harmony with the contentions of both Moore in his appeal and Pentecost in his motion for review. For the purposes of this decision, it is unnecessary to discuss at length its correctness; the facts in relation to Pentecost's license from the company and settlement on the land are substantially the same as those in the recent case of *Eastman v. Wiseman*, decided April 5, 1894, where it was held that similar facts as applied to Wiseman gave to him a preference right to purchase the land under the general forfeiture act.

In revoking your said office decision of November 10, 1892, as to the question of law, above referred to, your office also revoked the decision holding Pentecost's entry for cancellation, and held that entry intact. Said decision of November 10, 1892, was, however, adhered to in so far as it dismissed Moore's contest against Pentecost's entry, and Moore has appealed to this Department, insisting—

1. That your office erred in considering the motion for review after an appeal to the Secretary had been filed.

2. In revoking the decision of November 10, 1892, in so far as it held Pentecost's entry for cancellation.

3. In not deciding on the merits of the controversy as between Pentecost and Moore, and for that purpose appellant asks that the case be returned to your office for a decision.

When a decision of your office is necessarily adverse to both plaintiff and defendant, and one appeals and the others asks for review, and

both actions are taken in time, and both in accordance with the rules of practice, it is not error for your office to consider and pass upon the questions raised in the motion for review, practice rule 76 providing that such motions "will be allowed in accordance with legal principles applicable to motions for new trials at law." *Gray v. Ward et al.*, 5 L. D., 410. If, in such case, the motion for review and the appeal are based upon the same grounds of error, the granting of the motion necessarily suspends the operation of the appeal, and your office in such case has not lost its jurisdiction, but should pass in judgment upon the other issues, and determine therefrom which of the two has the superior rights.

It is claimed, however, that your office did not pass upon the respective rights of Pentecost and Moore.

In the decision appealed from it is said:

Said decision of November 10, 1892, will stand, however, as against contestant Moore, and the case will be promptly transmitted to the Department on his appeal, to which reference has been made herein.

While the reasons for this decision as relating to Moore are not set out *in extenso*, yet it must be regarded as a decision on the merits of the controversy as between him and Pentecost; it is also a decision from which an appeal would lie.

The appeal from that decision gives no reasons why Moore, and not Pentecost, has the better right to purchase the land, and I find no sufficient reasons for disturbing the decision appealed from. It is therefore affirmed.

EVIDENCE—CONTEST—CHARGE OF FRAUD.

DINGEE *v.* DAMERON.

The testimony submitted at a hearing cannot be considered as evidence if not signed by the witnesses, or accompanied by the officer's jurat.

It is no ground of contest that the entryman, for a consideration, agreed to contest a prior entry of the land, and, if successful to waive the preference right in favor of contestant, and that said entryman thereafter refused to abide by said agreement, but, having secured the cancellation of the prior entry, entered the land himself.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (G. C. R.)

On November 4, 1887, one Bernard Ladler made homestead entry for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 28, T. 8 S., R. 64 W., Denver, Colorado.

On August 24, 1888, Agnes Dameron filed her affidavit of contest against the entry, alleging abandonment.

Service was had by publication, and the hearing fixed for December 19, 1888, which was duly had, defendant making default. The register

and receiver recommended that the entry be canceled, and it was finally canceled by your office letter ("H") of May 13, 1890. Contestant was notified May 24, 1890, and on the same day made homestead entry for the land.

Two days thereafter (May 26) Chesley A. Dingee applied to make entry of the land, and his application was refused because of Miss Dameron's prior entry. Prior to his application, and on March 23, 1890, he made an affidavit, sworn to before a notary public, alleging that Miss Dameron instituted her contest for speculative purposes, being in the interest of a "*third*" party, with whom she agreed to bring the contest, and upon the cancellation of the entry waive her right to enter the land, so that the "*third*" party could make entry thereof; that she received a consideration for the agreement, and that the costs of the contest were paid by said third party.

This contest affidavit bears no file marks of the local office.

On June 29, 1891, Miss Dameron made application for a leave of absence for a period of one year, based upon her sworn averment, duly corroborated, that she had settled on the land prior to October 16, 1890, built a comfortable house, and lived continuously therein until November 6, 1890, when it was destroyed by fire; that she was dependent upon her own labor for support and means to improve her claim, and could get no work to do in that vicinity. It appears that her application was granted.

On April 22, 1892, Dingee filed an affidavit against Miss Dameron's entry, alleging abandonment, change of residence, failure to settle upon and cultivate the land. He also repeated his averments, made March 28, 1890 (above set out), adding that Miss Dameron made entry of the land for the purpose of defrauding him and in violation of her agreement,

claimant having agreed in consideration of a certain sum of money advanced by the contestant to the claimant to defray her traveling expenses from Sioux City, Iowa, to the city of Denver, Colorado, and in consideration of her support and maintenance for several months, and in consideration of the payment of the expenses incident to the securing of the cancellation of the entry of Bernard Lafler for said land

. Lafler having abandoned the land, she would not enter said land, but would waive her right of entry that in pursuance of said agreement, and with the knowledge and consent of said Dameron he did move to the land in January, 1889, and improved the same by erecting a good, substantial dwelling house, stable, corrals, chicken house; by digging a well, cellar, fencing the land, and cultivating a portion thereof—all which are of a value of not less than \$600; that said agreement was made by him in good faith to secure a home, etc. not for the purpose of violating any law.

Hearing was had on these charges, commencing July 18, 1892.

The examination of the witnesses for Dingee appears to have proceeded until three of them had testified, and the case adjourned until next day (July 19), when contestant filed a motion for continuance "on the ground of lack of funds wherewith to meet the expenses of taking further testimony." The sum of \$20 seems to have been required; the

register and receiver, on failure to make this deposit, overruled the motion for continuance, and contestant announcing he was unable to proceed further, the contest was dismissed.

From that action Dingee appealed, and your office, by decision dated November 26, 1892, affirmed the judgment, and a further appeal brings the case to this Department.

The statements purporting to have been made at the hearing by the three witnesses can not be accepted as evidence for the reason that the witnesses do not appear to have signed their names to the (so-called) testimony, nor is there any officer's jurat. If the same were otherwise formal and sufficient, the oversight would be fatal to contestant's cause, there being no testimony to warrant the Department in directing the cancellation of the entry. If these statements in the record were even regarded as testimony, they are insufficient to prove the allegation of abandonment; on the contrary, claimant's residence on the land and her efforts to improve the same are (as your office finds) "sufficient under the circumstances to evidence her good faith." If Dingee's statements (above set out), about his contract with Miss Dameron, are true, he still can not be heard to complain. He alleges a contract on claimant's part to contest a prior entry, waive her preference right, and allow him for a consideration to enter the land. If an allegation of fraud were made against a contestant and an entryman, alleging collusion to defraud the government, it would be a proper subject of inquiry.

The right conferred on a successful contestant by section 2, act of May 14, 1880 (21 Stat., 140), is a personal right, which can not be transferred to another. *Welch v. Duncan*, 7 L. D., 186; *Kellem v. Ludlow*, 10 L. D., 560.

If, in fact, Miss Dameron made the alleged contract with Dingee, and did not carry out its provisions, resulting in loss and damage, he has his remedy in the local courts; but the Department is powerless to relieve him from his unfortunate bargain. He can not be heard to allege a fraudulent contract against the entryman, and secure advantage therefrom, when he voluntarily participated in the very contract himself.

The decision appealed from is affirmed.

DESERT LAND FILING—LASSEN COUNTY ACT.

FANNIE D. LAKE.

A desert land filing, made either under the Lassen county act, or the general act, and abandoned, exhausts the claimant's right under the desert land law.

Secretary Smith to the Commissioner of the General Land Office, June 18,
(J. I. H.) 1894. (J. L. McC.)

Fannie D. Lake has appealed from the decision of your office, dated April 12, 1892, sustaining the action of the local officers in rejecting her application to make entry, under the desert land act of March 3, 1877, as amended by the act of March 3, 1891, of certain tracts in the Susanville land district, California.

The ground of said rejection was that the applicant had previously (on January 14, 1891,) made a desert land filing, under the act of March 3, 1875 (commonly known as the Lassen county desert land act); and that such filing was an exhaustion of her right under the desert-land laws of the United States, and no second entry can be allowed.

The appellant alleges that your office "erred in holding that the filing of a declaration, or the making of an entry, under the act of March 3, 1875, is an exhaustion of the applicant's rights under the desert-land laws."

The Department held in the case of *Ward v. McCole* (14 L. D., 220), that under the Lassen county act a person was restricted to one filing, and added:

If a party may be allowed to file more than once under said law, then he may file an unlimited number of times, and thus encumber the record of large bodies of land, to the exclusion of *bona fide* settlers . . . a few speculators could keep a large amount of the land practically closed against home-seekers, which would be, in my opinion, contrary to public policy.

The same reason would militate against the right of a party to make a filing for desert lands under the so-called "Lassen county act," to hold the same for an indefinite period, and then to file for other land under the later act.

In the case of *Simeon D. Wyatt* (18 L. D., 99), the Department held that Wyatt, who had entered and *reclaimed* two tracts, could be allowed to retain but one. The case now under consideration differs from that of Wyatt in that the applicant in this case has relinquished her claim under her former filing. But the argument in the Wyatt case, to the effect that the act of 1877 was intended as a *substitute* for that of 1875 (the Lassen county act) sustains the conclusion that the filing of a statement of intention to make entry under either of said laws, whether within Lassen county or elsewhere, exhausts the person's right under the desert land laws of the United States.

With this construction of the law, a logical uniformity of ruling is secured in case of desert-land filings, pre-emption filings, soldiers' declaratory homestead filings, timber-land filings, etc.

Your office decision is affirmed.

RESERVOIR LANDS—SETTLEMENT RIGHTS.

THIELMAN ET AL. v. McDONALD.

One who knowingly enters and occupies lands opened to settlement by the act of June 20, 1890, prior to the time fixed therefor, is disqualified thereby, though he does not then go upon the tract subsequently claimed.

The disqualification imposed by said statute on persons who enter upon said lands during the prohibited period, extends to one who thus enters for the purpose of locating another party on said lands.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (E. M. R.)

The record shows that on December 20, 1890, John McDonald made homestead entry for the NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and lot 1, of Sec. 23, T. 39 N., R. 6 E., and lots 8 and 9 of Sec. 14, same township and range, Wausau land district, Wisconsin.

On January 16, 1891, Emile Thielman made application to enter lots 8 and 9, of Sec. 14, and lot 1 of Sec. 23, more particularly described above, alleging settlement December 20, 1890.

December 24, 1890, Wm. H. Clawson made application to enter lots 8 and 9 of Sec. 14, lot 1 of Sec. 23, and the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 23, of the above mentioned township.

December 29, 1890, Thos. I. Laughlin made application to enter lots 8 and 9 of Sec. 14 and lot 5 of Sec. 13, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 23.

On December 31, 1890, Albine C. Friend made application for lots 8 and 9 of Sec. 14, and lot 1 of Sec. 23, alleging settlement on December 20, 1890.

Henry W. Boyer on January 16, 1891, made application to enter lots 1, 2 and 3, being the NW. $\frac{1}{4}$ of Sec. 23, T. 39, R. 6 E., alleging settlement December 20, 1890.

A hearing was ordered and on February 11, 1892, the local officers rendered their joint decision wherein they found that Thielman, Clawson, Friend, and Laughlin were settlers equally entitled to right of entry to lots 8 and 9 of Sec. 14, and held H. W. Boyer to be entitled to lot 1 of Sec. 23, and that McDonald's entry should be canceled.

From that decision Friend, McDonald, Laughlin, and Clawson appealed.

On August 5, 1892, your office decision was rendered wherein you found that Thielman, Friend, and Boyer were disqualified as settlers upon the land by reason of entry and occupation prior to the legal opening thereof for such purpose, and held McDonald's entry for cancellation as to lot 8, allowed McDonald to take, as his selection, either lot 9, of Sec. 14, or lot 1, of Sec. 23, as they were not contiguous, and directed that if McDonald selected lot 9, Clawson would be allowed lot 1, of Sec. 23, and if McDonald selected said lot 1, and Laughlin desired to make entry of lot 8, he would have to relinquish all right as

to lot 5, of Sec. 13, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 24; and lot 8, as between Clawson and Laughlin, would be awarded to the highest bidder; but if Laughlin chose lot 5, of Sec. 13, and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 23, then Clawson would be permitted to make entry of lot 8 of Sec. 14, together with lot 1, of Sec. 23.

From this decision all parties in interest appealed.

After an examination of the testimony, I concur in your office decision, in so far as it holds that Thielman, Friend, and Boyer were disqualified by reason of violating the act of Congress opening these lands to settlement.

The evidence clearly shows that they had entered and occupied water reserve lands, prior to the time fixed for the opening thereof, with the intention of selecting tracts for appropriation upon the opening of the land to entry.

In the case of *Box v. Dammon et al.* (18 L. D., 133), it was held, *inter alia* :

One who purposely enters upon the reservoir lands, restored to the public domain by act of June 20, 1890, prior to the time fixed therefor and goes upon the tracts he subsequently selected, is thereby disqualified to make homestead entry of said lands, though outside when the land was opened to settlement.

There is no difference in principle in the case of a person who purposely enters and goes upon a tract upon which he subsequently settles, and of one who knowingly enters but does *not* go upon the land he subsequently seeks to secure under the homestead laws. The law forbids any one to "enter and occupy" etc., and Boyer, Friend and Thielman had violated the letter of the law as completely as did Box in the case *supra*.

I do not concur in your conclusion that Laughlin is a qualified entryman of these lands. The evidence shows that he located Boyer and others upon Wausau water reserve lands on December 19; and while it does not appear that he went upon these lands for the purpose of securing a home for himself, he, nevertheless, was unlawfully there, and being unlawfully there, he comes within the rule which holds that a person who enters the prohibited reserve land during the period in which such lands were not open to entry is disqualified by such entry, unless it appear that he was lawfully there. The fact that such entry was for the benefit of others does not protect him. He had no expressed or implied authority for being there; on the contrary, the language used in this connection is specific and positive and disqualifies any and all persons who enter these lands prior to the time fixed therefor.

There is now left for consideration only the claims of the settler Wm. H. Clawson. The evidence in his behalf shows that at twelve o'clock, a. m., of December 20, he, Clawson, went on lot 8 in Sec. 14, and put up a notice on the first tree he came to, which he blazed a little; that he got some logs and placed them in shape for the founda-

tion of a house; that he then went on lot 1 in Sec. 23, and afterwards returned to town, having remained on the land about three-quarters of an hour; that about four o'clock of the same morning he returned and placed notices on the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 23 and on lot 9 of Sec. 14, and sought to find the corner stone on Secs. 23 and 14; that he contracted during the day with some men to build a house; paid them twenty dollars during the afternoon and left thirty-five dollars with another parson to be given to them, as they needed it, for this purpose, and later on, in the afternoon, he took the train to Wausau to file upon the land, but did not do so on account of the crowd; having heard that the men he had employed for the purpose of building his house had been interfered with by one of the settlers, he went back to Minocqua. The building of his house was commenced on the 24th of December, and he moved into it on the 10th of the following January. His improvements are substantial and are on lot 8, being the lot that he first went upon.

The settlement of Clawson having been made on lot 8 prior to the allowance of McDonald's entry, there can be no question as to his being entitled thereto.

On October 11, 1893, McDonald relinquished his entire entry. As Clawson made application for the land so relinquished by McDonald—and as it had already been seen that the other applicants are disqualified as homesteaders on the reserve lands—it follows that your office decision will have to be modified and Clawson will be allowed to make entry of the entire tract.

PRACTICE—AMENDMENT—SIMULTANEOUS CONTESTS.

SEEDS ET AL. v. JONES.

A contest affidavit, in which the entryman is charged with abandonment and non-compliance with law, may be amended on the suggestion of the entryman's death and his heirs made parties to the suit; and the right to so amend is not defeated by the pendency of a contest filed by another party at the same time, against the entry in question.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (W. F. M.)

On July 3, 1889, Mathew G. Jones made homestead entry of the NE. $\frac{1}{4}$ of section 11, township 16 N., range 1 W., within the Guthrie land district, Oklahoma.

On January 6, 1890, there was received at the local office, through the mails, and duly filed, an affidavit of contest by John W. Johnson, alleging that

the said Nathan (Mathew) G. Jones, his heirs and legal representatives, have wholly abandoned said tract; that he never established his residence thereon during his lifetime or since making said entry; that said tract is not settled upon and culti-

vated by said party as required by law, or by any of his heirs or legal representatives, and all the above named defaults still exist.

There was received through the same medium, on the same day, and filed at the same instant of time, another affidavit executed by George M. Seeds, alleging that "the said entryman has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said parties as required by law," but making no suggestion of the death of Jones, which occurred in the latter part of July, 1889, within less than a month of the date of his entry.

On November 18, 1890, John W. Johnson appeared at the local office and filed a motion to dismiss the contest of Seeds

for the reason that the said Nathan (Mathew) G. Jones departed this life prior to the filing of said contest and because the heirs and legal representatives of said Jones are not made parties defendant to said contest, and because said contest is for said reason in law a nullity, and should not be entertained to the prejudice of said contestant John W. Johnson.

On December 13, 1890, Seeds filed a supplemental affidavit, reiterating the allegations of his initial affidavit, and asking that Mrs. Mary E. (R) Jones, widow, and Mrs. L. (Anna) N. (M) Dadisman, daughter, of the deceased entryman, be made parties.

It is not inappropriate to call attention, here, to the misnomer of the entryman, as well as of his heirs, carried through the entire proceedings, but since no exception has been taken thereto, and inasmuch as the thing in controversy, the land, is correctly described and identified, the discrepancy will be ignored.

On January 15, 1891, the register and receiver rendered a decision on Johnson's motion to dismiss, holding

that it was wholly irregular to have initiated a contest against a dead man by name, and that no rights could be acquired thereby as against a simultaneous or intervening contest against the proper parties and that any proceedings under such a contest would be a nullity, [and recommending that] inasmuch as an amended affidavit has been filed by Seeds against the heirs of Jones the same should be held as a second contest and held in abeyance to await the result of Johnson's contest.

On March 3, 1891, pending Seeds's appeal from the decision of the register and receiver, Johnson filed the relinquishment of Mrs. Mary R. Jones and Mrs. Anna M. Dadisman, the widow and daughter, respectively, of the deceased entryman, and at the same time made homestead entry of the land thus relinquished.

The foregoing proceedings having been made in the local office, the case has finally reached this Department on appeal by Johnson from the decision of your office reversing that of the register and receiver, and holding that Seeds's contest affidavit was subject to amendment notwithstanding Johnson's simultaneous contest, and directing the suspension of Johnson's entry and that both parties be notified "that on a certain day they will be allowed to bid for the right of preferred contestant, and that he who bids the greater sum will be considered as

such contestant." It was further laid down for the guidance of the local officers that

if such award be made to Johnson his entry should be allowed to remain intact, and Seeds's contest should be dismissed. If the award is made to Seeds, the relinquishment of Jones's entry will be presumed to be the result of such contest, and Johnson should be allowed an opportunity to show that the relinquishment was an independent transaction; whereupon it will devolve upon Seeds to establish the truth of his allegations of contest.

The appellant charges your office with error in holding Seeds's affidavit as amendable, first, because the said affidavit is a nullity, and therefore supplies no basis for amendment, and, second, because Johnson's affidavit was the first and only statutory ground of complaint filed in the local office and that such holding deprives Johnson of the fruits of his labor. Succinctly stated, the contention is that the affidavit is not amendable at all, and if so, that the right of amendment is barred by appellant's adverse demand.

Perhaps the earliest leading case bearing upon the question here raised is that of *Fisher et al. v. Salmonson*, 4 L. D., 538, in which there were two contestants, one of whom, O'Hara, in ignorance of the death of the entryman, had directed the proceedings against him instead of his heirs. O'Hara was permitted to amend, and the ruling was rested upon the "broad principle" followed in the courts "that where the rights of the parties are not prejudiced by allowing amendment, or where there is a substantial subject-matter, or remedy sought, the case will not be dismissed, but due time and terms given for such amendment," citing numerous authorities. It was further said, in that case, that

contests like this to clear the record partake largely of the nature of actions *in rem*. So where the land is properly described in the affidavit of contest certainly as to the subject matter of the contest is secured and the foundation laid for subsequent action.

This doctrine was re-affirmed in the case of *Norton v. Thorson et al.*, 10 L. D., 261, where the facts were somewhat similar.

In all of the cases cited and relied on by the appellant there was a fatal violation of imperative rules of practice.

In *Farmer v. Moreland*, 8 L. D., 446, Farmer's affidavit was rejected because it was not corroborated. He did not ask leave to amend, but at a later date he filed a corroborated affidavit which was rejected because of a second contest that had, meanwhile, intervened, and from this order of rejection he appealed. He had no contest pending when the second contestant came in, and there was, therefore, nothing for him to amend.

In *Hawkins v. Lamm*, 9 L. D., 18, and in *Hay v. Yager et al.*, 10 L. D., 105, the affidavits did not state facts sufficient to constitute a cause of contest. In those cases therefore, there was nothing substantial upon which to base amendment.

I think the weight of authority, at least, supports the view of your office decision, and it is, therefore, affirmed.

PRACTICE—NOTICE OF CONTEST—JURISDICTION.

ELTING *v.* TERHUNE.

The service of a notice of contest by registered letter is not personal service within the meaning of Rule 9 of Practice.

A case will not be remanded on objection to the notice, though such objection be well grounded, where the defendant appears, participates in the trial, and appeals; asking for a judgment on the merits of the case, and no prejudice is shown.

The cases of *Crowston v. Seal*, *William W. Waterhouse*, and *Anderson v. Tannehill*, overruled.

Secretary Smith to the Commissioner of the General Land Office, June 18,
(J. I. H.) 1894. (G. B. G.)

On July 29, 1889, John E. Terhune made homestead entry of the SW. $\frac{1}{4}$ of Sec. 17, T. 17 N., R. 3 W., of the Guthrie, Oklahoma, land district.

On August 10, 1889, the plaintiff herein, John H. Elting, made application to enter the same tract, which was rejected because of the prior homestead entry of Terhune.

On September 9, following, Elting filed appeal from the action of the local officers, rejecting the same, and said appeal was sustained by your office, because of the said Elting's allegation of prior settlement, and a hearing ordered by letter of January 4, 1890.

At the hearing, Terhune's attorneys made special appearance, and moved to dismiss, for failure of proper service of notice of contest, also that plaintiff had failed to appeal from the rejection of his homestead application in thirty days. This motion was overruled, exceptions to the ruling taken, and the case went to trial, and on the evidence adduced, the register and receiver found in favor of the contestant, and recommended Terhune's entry for cancellation.

Terhune appealed from said finding, as contrary to the law and the evidence, and after considering said appeal, by your office opinion of June 14, 1892, all proceedings before the local office were vacated, for want of jurisdiction, on account of deficient service of notice, and the cause remanded for hearing *de novo*.

From this last named decision contestant has appealed to the Department, alleging six specifications of error, which may be reduced to three:

1st. In holding that the service of notice was insufficient to confer jurisdiction.

2d. In failing to find that the defendant had, by participating in the trial after his motions to dismiss were overruled, waived all defects of service, and objection to the jurisdiction.

3d. In vacating the proceedings, and ordering a hearing *de novo*.

It appears that notice of contest herein was issued from the local office September 13, 1890, the defendant being summoned therein to

appear at the U. S. Land Office at Guthrie, Oklahoma, and answer on November 17, 1890.

A copy of this notice was mailed to said defendant, Terhune, at Guelph, Kansas, defendant's former home, and where he was at that time, on October 4, 1890, and was received by said defendant at said place, on the same day it was mailed, and, as will be perceived, more than thirty days before the time fixed in said notice for the hearing. That said letter was in fact received at the time and place mentioned aforesaid, is evidenced by the return registry receipt, signed by said Terhune, and the receipt of said notice, as above stated, is not denied in the record, it being, as a matter of fact, unreservedly admitted, yet on this state of facts the question of insufficient service of notice of contest is made, and this brings us to a consideration of the first specification of error on appeal.

Rule 9 of Practice provides that:

Personal service shall be made in all cases when possible, if the party to be served is resident in the State or Territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served.

Rule 15, provides that

Proof of personal service shall be the written acknowledgment of the person served, or the affidavit of the person who served the notice attached thereto, stating the time, place and manner of service.

In the case at bar, it is contended by counsel for contestant that the claimant was not a resident of the Territory in which the land is situated, but this contention is not established by the preponderance of the testimony, and the questions of law growing out of such contention will not be considered.

The question of the sufficiency of service of notice of contest, by registered letter, has often been before the Department for adjudication. The later departmental decisions on this question clearly hold that such service of notice is not warranted by the Rules of Practice, and it is now well settled that service of notice by registered letter, is not personal service, within the meaning of Rule 9. *Driscoll v. Johnson* (11 L. D., 604); *Anderson v. Ray* (12 L. D., 620); *Farrier v. Falk* (13 L. D., 546); *Chesley v. Rice* (16 L. D., 120). But the earlier departmental adjudications on this question hold that such service of notice is good, and these cases have never been distinctly overruled. See *Crowston v. Seal* (5 L. D., 213); *William W. Waterhouse* (9 L. D., 131); *Anderson v. Tannehill et al.* (10 L. D., 388).

In the case of *Driscoll v. Johnson* (*supra*), which takes the initiative in departing from the then established rule, the preceding leading cases on this question are collated, and it is therein held that said cases are not at variance with the rule as therein promulgated, and for this reason these cases were not overruled.

After a careful examination of these cases, I am clearly of the opinion that they committed the Department to the position that "service

by registered letter is personal service, as required by Rule 15 of Practice." (I quote from *Anderson v. Tannehill* (*supra*), wherein the afore-said cases of *Crowston v. Seal* and *ex parte Wm. Waterhouse* are approved by citation), and to avoid confusion and misapprehension, said cases should be overruled.

Under Rule 10 of Practice, "personal service may be executed by any officer or person", and under Rule 9, as has been seen, "shall consist in the delivery of a copy of the notice to the person to be served." That the postal system is an officer or person, within the meaning of the rule, will hardly be contended, and yet these two rules are the only ones we have providing for a *means* of personal service.

Rule 9 requires actual service, or service by actual delivery of a copy of notice, or other paper that is to be served.

Rule 15 (*supra*) evidently contemplates that when an acknowledgment of service is made, it shall be such a writing as that of itself shows the character of the paper received. For instance, an acknowledgment on the original paper filed, or an acknowledgment on a copy furnished a person and signed and returned by him. In such case, the acknowledgment on the original or copy would show the character of the paper served upon the person who acknowledged the service.

The signing of a return registered letter card can not be considered an acknowledgment of service, for the reason that it does not identify any paper that is served, or acknowledged by the person who signed the card. In order to connect that card with any paper, other evidence would have to be resorted to, and when this is the case, it is not, in my judgment, an acknowledgment, within the meaning of Rule 15 of Practice. The cases of *Crowston v. Seal*, *ex parte Wm. W. Waterhouse*, and *Anderson v. Tannehill*, hereinbefore cited, are hereby overruled, and the case of *Driscoll v. Johnson* (*supra*) is modified in so far as it undertakes to hold that the position taken therein is not at variance with previous authorities.

In the case at bar, the claimant was present at the hearing, by himself and counsel, cross-examined the contestant's witnesses, introduced evidence in his own behalf, and when the decision of the local officers was adverse to him, appealed to your office, and in addition to the technical points made, asked for a decision on the merits of the case.

It appears to me, in view of the extra expense that a new hearing would entail, and the length of time that has elapsed, thereby making it very improbable that a new trial could be had under as favorable conditions as the first, this case should be decided on its merits, as the record is now made, especially as it is not claimed that the contestee was deprived of the right or opportunity of introducing any proof, or of availing himself of any legal rights, for want of sufficient notice of contest.

In view of the conclusions hereinbefore reached, it is unnecessary to pass on the other specifications of error herein.

For the reasons herein set forth, the decision appealed from is reversed, and the cause remanded for a decision of your office on the whole case.

RELINQUISHMENT--CANCELLATION.

HARDY v. THEUS.

A relinquishment is ineffectual until filed, but when filed it operates *eo instanti* to release the land from appropriation.

An entry erroneously and inadvertently allowed of land already appropriated by the entry of another, should not be canceled by the local office on its own motion, but where appeal is allowed from such action it will be treated as a decision recommending cancellation of the entry.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (G. C. R.)

D. Henry Hardy has appealed from your office decision of May 21, 1892, which affirms the action of the register and receiver cancelling his entry, made March 24, 1892, for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 30, T. 18 N., R. 8 W., Natchitoches, Louisiana.

The facts are as follows:

Edward J. Noles made entry of the land October 16, 1891. He executed a relinquishment of said entry November 28, 1891, the same being duly acknowledged on that day before the clerk of the district court of Webster parish, Louisiana.

On March 7, 1892, Hardy's attorneys wrote to the local officers, enclosing Hardy's affidavit and homestead application for the land and a check for \$13, to cover fee and commissions. The application was rejected, because the land applied for was covered by Noles's entry, which was intact upon the records. On March 9, 1892, Hardy's attorneys requested the local officers to defer the cancellation of Noles's entry, should a relinquishment therefor be presented. The register and receiver declined to comply with the request, as being contrary to law.

On March 16, 1892, James Theus presented at the local office Noles's relinquishment (above mentioned), the entry was canceled, and he immediately entered the land.

Through an inadvertence of the register, Hardy's application to enter the land was accepted, on March 24, 1892. When the conflict was discovered, six days thereafter, the register and receiver canceled Hardy's so-called entry, advising him of the facts, and gave him thirty days within which to appeal.

Appeal was duly perfected, and your office by decision of May 21, 1892, affirmed the action of the register and receiver, saying:

Hardy's entry covering land already entered, having been inadvertently made, and Hardy having failed to set up any prior valid claim to the land, your action canceling the entry, though irregular, no hearing having been had, is affirmed.

It is insisted that the decision appealed from is contrary to the law and evidence, in that appellant's entry was canceled without any hearing; that Hardy was the first legal applicant for the land, having made such application after Noles had relinquished his entry; that a certificate of the clerk, who took the acknowledgment of Noles's relinquishment, accompanied Hardy's application to enter, showing that the land was free from any claim, and therefore subject to Hardy's prior application.

A relinquishment is ineffectual, until it is filed (*Wiley v. Raymond*, 6 L. D., 246), and when filed, it operates *eo instanti* to release the land from entry. (*Tilton v. Price* 4 L. D., 123; *Melcher v. Clark*, *idem.*, 504; *David J. Davis*, 7 L. D., 560.) Act of May 14, 1880, 21 Stat., 140.

A relinquishment executed, but not filed, is not proof of abandonment. (*Roach v. Fleming*, 2 L. D., 27); but when the same is presented, it should be received, and the entry canceled. (*Bradway v. Doud*, 5 L. D., 451.)

It follows that, when Theus presented Noles' relinquishment, the latter's entry should have been canceled at once, and the land being free, was subject to Theus's application, which was properly allowed.

If Hardy really made an entry of the land, which was covered by the prior, subsisting entry of Theus, the local officers had no authority to cancel or expunge his entry from the records, simply on their own motion (*Wetzel v. Brush* 4 L. D., 554); nor should an entry be canceled without notice to the entryman. (*William Johnson*, *idem.*, pp. 11 and 397.)

An important question, therefore, arises, as to what was the effect upon the land in question, and of Hardy's rights thereto, by the inadvertent and erroneous action of the local officers in allowing his application, and making the records show that he had made an entry.

On October 26, 1883, Secretary Teller said, in the case of *McAvinney v. McNamara* (3 L. D., 552): "It is well settled that a homestead entry is an appropriation of the land covered thereby, pending which no pre-emption right can attach."

March 12, 1884, the same Secretary decided, in the case of *Davis v. Crans et al.* (3 L. D., 218), that a homestead or timber culture entry is an absolute appropriation of the land so long as it remains of record.

In the case of *Henry Cliff* (3 L. D., 216), it was held that entries of record *prima facie* valid "appropriate the lands covered thereby, and while they remain uncanceled, the land is not subject to further entry."

The same doctrine is announced in *Whitney v. Maxwell*, 2 L. D., 28.

If Theus's entry "appropriated" the land and segregated it from the public domain, while that condition existed, no one else could acquire any rights thereto; it follows that the acceptance of Hardy's application to enter was erroneous. The action of the local officers in canceling his entry outright was irregular; but, inasmuch as he was notified and given a right of appeal, such action will be treated as one recommending the entry for cancellation.

On the admitted facts in the record, Hardy has no standing as an entryman.

It is alleged in the appeal that Theus's entry was not made in good faith, but for the use and benefit of A. Goodwill. If for this, or any other sufficient reason, it be shown upon proper proceedings that Theus's entry is illegal, the same will be canceled and a preference right awarded to the contestant; but these allegations set up in the appeal can not now be considered, since they are met by counterstatements made under oath, which tend to show the good faith of the entryman.

The decision appealed from is affirmed.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

PATTERSON *v.* BALL ET AL.

The prohibitory provisions in the acts of Congress opening to settlement the territory of Oklahoma, were intended to include persons who entered the territory prior to their respective dates, and there remained in violation of said provisions, as well as those who entered said territory subsequently.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 18, 1894. (J. I. P.)

On May 4, 1889, Samuel W. Ball made homestead entry No. 937, Guthrie series, of lots 1 and 2, and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 6, T. 11 N., R. 2 W.

May 15, 1889, Patterson filed an affidavit of contest against said entry, alleging that Ball was in the Oklahoma country between March 23, and 12 o'clock, noon, April 22, 1889, and that he, Patterson, was the first actual settler on said lands.

A hearing was had before the local office December 1, 1890. But before going to trial, at which both parties were present in person, Patterson dismissed that part of the charge that alleged Ball's presence in the territory prior to 12 o'clock, noon, April 22, 1889.

The decision of the local office rendered May 26, 1891, found that Patterson had sustained his charge of prior settlement. But that he was disqualified to enter the tract embraced in Ball's homestead entry, because of the fact that he had entered the Oklahoma country about the 25th of February, 1889, and had remained there until March 28, 1889. That during a portion of that time he was encamped in the vicinity of the tract in controversy, and that while encamped there he formed the intention of taking a tract of land in that immediate neighborhood. That he had no license from any one in authority to enter said territory, or to remain there, and that leaving said territory about March 28, 1889, he remained outside until 12 o'clock, noon, April 22,

1889, when he entered with the rest of those entering at that time, and on the afternoon of that day settled on the tract in controversy.

Upon those facts the local office recommended that the contest be dismissed, and Ball's homestead entry be held intact, it having been shown from the evidence that he had established settlement on said land within six months from the date of his entry, and maintained his residence thereon continuously from that time to the date of the hearing.

June 16, 1891, Patterson appealed to your office. Pending that appeal, on June 26, 1891, Ball relinquished his entry, and William N. Wilson made homestead entry No. 594 for said tract on the same day.

On the same day, but after Wilson had made his entry, Patterson applied to make homestead entry of said land, which application was rejected because of conflict with Wilson's entry. From that action Patterson also appealed.

The decision of your office, rendered December 10, 1892, found the facts to be substantially as stated by the local office, with the addition that Patterson went into the territory, as stated, to find his son, who was supposed to be in the Cherokee Strip; that while there, having a team, he was engaged in moving other campers. That he did determine while there to enter land as soon as it was open to settlement, but had not fixed on any particular tract. That having gone out of the territory, as stated, he entering at the appointed time selected the tract in dispute. Your office decision then concludes that he is not disqualified as a homestead entryman, reversed the decision of the local office, and holds Wilson's homestead entry for cancellation, stating also that Wilson's application to enter should have been received, subject to Patterson's rights in the pending contest.

Wilson, filing an application to intervene as the real party in interest, appeals from said decision to this Department, assigning ten errors in said decision, which, in substance, are that your office erred in concluding from the facts found that Patterson was not disqualified as a homestead entryman within said territory.

There is no controversy over the facts; the question presented is one of law purely.

The Oklahoma country was opened for settlement by the acts of Congress of March 1, 1889 (25 Stat., 757-759), of March 2, 1889 (25 Stat., 980), and the President's proclamation of March 25, 1889. In the second section of the act first mentioned it is declared—

that any person who may enter upon any part of said lands . . . prior to the time that the same are opened to settlement by the act of Congress shall not be permitted to occupy or make entry of such lands, or lay any claim thereto.

In the second act mentioned, it is declared—

that until said lands are opened for settlement by proclamation by the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

The President's proclamation declares—

that no person entering upon and occupying said lands before said hour of 12 o'clock, noon, of the 22nd day of April, 1889, will ever be permitted to enter any of said lands or acquire any rights thereto.

The contention of Patterson is that he does not come within the purview of either of the acts mentioned, for the reason that he *entered* the territory prior to their passage, and left it a day or two after the President's proclamation.

The facts in the case are very similar to those in the case of *Sullivan v. McPeck* (17 L. D., 402), and of *Dean v. Simmons* (17 L. D., 526); in the first mentioned case the entryman was in the territory in the employ of a cattle company from March 1 to 15, 1889, and guarded cattle near the land he subsequently settled on. He went out of the territory on the last named date, but returned to the line nearest the land in question on the 19th of April, from which point at the appointed time, with his brother, he made the run directly to the tract involved. The Department held that he was disqualified as entryman.

In the latter case the entryman was in the territory with a party in the month of March and fore part of April, 1889, searching for corner stones, running lines, etc., and was encamped for a time near the land subsequently selected. When informed of the acts of Congress he left the territory, remained outside until the appointed time, when he re-entered and settled on said tract. The Department held that he was disqualified.

Without multiplying precedents, I am convinced that the acts of Congress, *supra*, and the President's proclamation, were intended to reach those who entered the territory prior to their respective dates, and who remained there in violation of their provisions, as well as those who entered the territory subsequent to that time. I am also clearly of the opinion that under the facts in this case, Patterson is disqualified as an entryman in the Territory of Oklahoma.

The application of Wilson, as the real party in interest to intervene, is allowed, and his appeal sustained.

Your office decision is reversed, with directions to dismiss Patterson's contest, and hold the entry of Wilson intact.

PRACTICE—NOTICE OF APPEAL—RULE 48.

NEWTON *v.* POWELL.

In the absence of due service on the opposite party of the notice of appeal from the local office the Commissioner is without authority to reverse the decision below except under the provisions of rule 48 of practice.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 21, 1894. (J. I. P.)

I have considered the appeal of George W. Powell from your office decision of July 7, 1892, involving lot 2, Sec. 30, T. 31 N., R. 40 E., W. M., Spokane series, Washington.

The record shows that Powell, on October 29, 1888, made pre-emption filing for said lot, with other lands, alleging settlement thereon October 5, 1888.

February 28, 1889, John H. Newton made homestead entry No. 6498, embracing said lot, with other lands.

July 20, 1891, Powell offered final pre-emption proof, to the acceptance of which, as to said lot 2, Newton protested.

Trial was at once had before the local office, which, on the evidence submitted, decided adversely to Newton, recommending the acceptance of Powell's final proof, and the cancellation of Newton's homestead entry as to said lot 2.

Within the time required Newton filed his appeal from said decision. No acceptance of service of notice of said appeal on the part of Powell or his attorney was attached thereto, nor any evidence of any kind that such notice was ever served on either of them.

On July 7, 1892, your office rendered its decision in said case, reversing the decision of the local office, and rejected Powell's final proof as to said lot 2, and holding Newton's homestead entry, with reference thereto, intact.

Powell appeals from that decision on the grounds—

First. That said decision was contrary to the law and evidence in the case.

Second. That it was error on the part of the Hon. Commissioner to reverse a decision in favor of the claimant, G. W. Powell, made by the register and receiver of the local land office, the protestant, Newton, having never filed an appeal from said decision.

Third. An error on the part of the Hon. Commissioner to award protestant Newton the land involved in the controversy, after judgment had been rendered by the local land office, adverse to the said Newton, and he having filed no appeal therefrom, as provided in accordance with the law and practice of the Land Department.

Notice of this appeal was duly served on Newton by registered letter, which was received by him, as evidenced by the return receipt, October 15, 1892, the mailing of said notice being evidenced by the affidavit of S. A. Wells, Powell's attorney. There is no answer to this appeal, nor argument of any character in reply thereto on the part of Newton.

It is asserted in the argument accompanying said appeal and attached thereto, that no notice of Newton's appeal from the decision of the local office, or specification of error, was ever served on either Powell or his attorney, and that they had no notice or knowledge of any appeal in the case. I have searched the record in vain for any evidence of the service of notice of Newton's appeal: In the letter of the local office, dated October 17, 1891, transmitting the papers in the case on said appeal, it is stated, after giving a chronological statement of the papers transmitted, "Appeal filed by Newton October 5, 1891."

No reference is made to any evidence of service of notice of said appeal.

In transmitting the appeal of Powell from the decision of your office of July 7, 1892, *supra*, the local officers, in their letter of transmittal dated November 14, 1892, after stating the date of filing of said appeal, say—"Find herewith evidence of service of notice of the appeal and specifications of error upon John H. Newton."

The absence of any affirmative showing in the record of service of notice of Newton's appeal from the decision of the local office; the omission of the local officers to refer to it in their letter of transmittal of October 17, 1891, when they do refer to such evidence in the transmittal of Powell's appeal from your office decision, *supra*; the failure of Newton to reply to the charge (after he was served with notice thereof) that no notice of such appeal was ever served on either Powell or his attorney, all suffice to convince me that notice of said appeal was never served upon either Powell or his attorney, and that they had no notice or knowledge of it. (*Witt v. Henley*, 12 L. D., 198.)

Rule of Practice No. 46 requires service of such notice. "Notice of appeal is mandatory, and has all the force and effect of law." Without service of notice of said appeal the action of your office in reversing the decision of the local office is without authority of law, and hence void, unless based on one of the provisions of Rule 48, of the Rules of Practice, the provisions of which are of follows—

In case of failure to appeal from the decision of the local officers, their decision will be considered final as to the facts in the case, and will be disturbed by the Commissioner only as follows:

1. Where fraud or gross irregularity is suggested on the face of the papers.
2. Where the decision is contrary to existing laws or regulations.
3. In event of disagreeing decisions by local officers.
4. Where it is not shown that the party against whom the decision was rendered was duly notified of the decision and of his right of appeal.

Taking those provisions in their order, I find that there is nothing on the face of the papers that would warrant such action under the first one.

The second one is applicable only when the controversy is between the claimant and the government (*Watts v. Forsyth*, 5 L. D., 624). That is not the case here.

There are no disagreeing decisions by the local officers, and the attempt of Newton to appeal shows that he had full knowledge of the decision of the local office, so that the third and fourth provisions of said rule do not apply.

Unless such action as your office decision is clearly warranted by said rule, the decision of the local officers should not be disturbed (*Lindgren v. Boo*, 7 L. D., 98).

Clearly your office decision is not based on any of the provisions of Rule of Practice No. 48, nor is it authorized thereby. Said decision is therefore reversed, and the papers in the case are herewith returned to your office, with instructions to dismiss the appeal of Newton, and close the case.

CONNORS v. MOHR.

Motion for review of departmental decision of April 5, 1894, 18 L. D., 380, denied by Secretary Smith, June 23, 1894.

RAILROAD GRANT-INDEMNITY SELECTIONS.

NORTHERN PACIFIC R. R. Co.

The right to select indemnity within the second belt can not be recognized until it is made to appear (1) that the grant, in the State in which the selection is sought to be made, can not be satisfied within the limits of the first belt, and, (2) that the loss, specified as the basis for such selection, occurred from a disposal subsequent to the passage of the act of July 2, 1864.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 27, 1894. (F. W. C.)

With your office letter of May 19, last, was forwarded for my approval, clear list No. 9, covering 23,485.06 acres of land within the second indemnity limits of the grant for the Northern Pacific Railroad company, as provided for in the joint resolution of May 31, 1870. (16 Stat., 37.)

The lands included in said list are within the Duluth land district, Minnesota.

By the provisions of the act of July 2, 1864 (13 Stat., 365), making the grant for said company, indemnity is provided for in lieu of land lost prior to the definite location of the road, to be selected not more than ten miles beyond the limits of the granted sections.

By the resolution of May 31, 1870, *supra*, it is provided:

In the event of there not being in any State or Territory in which said main line or branch may be located at the time of the final location thereof, the amount of lands per mile granted by Congress to said company within the limits prescribed by its charter, then said company shall be entitled under the direction of the Secretary of the Interior, to receive so many sections of land, belonging to the United States

and designated by odd-numbers within ten miles on each side of said road, beyond the limits prescribed in said charter as will make up such deficiency on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of lands that have been granted sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four.

It will be seen that said resolution has two conditions precedent to the right of selection not found in the indemnity provision generally contained in grants made to aid in the construction of railroads, namely: that it must appear that the grant, in the State in which the selection is sought to be made within the second indemnity belt, can not be satisfied within the limits of the first belt provided for in the act of 1864, (*supra*) and second, that the loss, made the basis for the selection, should have occurred from a disposition made subsequent to the passage of the act of July 2, 1864 (*supra*).

The certificate attached to the list in question in referring to the tracts designated as bases, states that they "were actually lost to the grant and, so far as shown by the records, they have not been used heretofore as bases for other selections."

There is in no place in the list nor in the letter of transmittal a statement or certificate from your office to the fact either that the grant can not be satisfied in the State of Minnesota, within its first indemnity belt, nor that the losses assigned for the bases in this list, occurred from disposals subsequent to the passage of the act of July 2, 1864, as is required by said resolution of July 31, 1870 (*supra*).

Upon inquiry at your office, I learn that examination was not made for the particulars referred to, and the list is therefore herewith returned for further examination, to the end that the certificate attached to the list may be supplemented by a statement in the matter of the particulars indicated.

STATE OF WASHINGTON v. MCBRIDE.

Motion for review of departmental decision of March 17, 1894, 18 L. D., 199, denied by Secretary Smith, June 23, 1894.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

HIGGINS ET AL. v. ADAMS.

Crossing the territorial line (to obtain water), prior to the hour fixed for entering the territory for purposes of settlement, does not disqualify the settler, it appearing that he returned to the boundary line and there awaited the hour for entering, that the watering place visited was used by the people camping in that vicinity, and was not in the neighborhood of the land settled upon.

Secretary Smith to the Commissioner of the General Land Office, June 29,
(J. I. H.) 1894. (J. L.)

I have considered the appeals to this Department taken by Arren G. Lewis, Robert W. Higgins, Cynthia E. Couch, Townsite Board No. 2, Sarah A. Waynick and John C. Adams, respectively, from your office decision of April 27, 1893, in the case styled Robert W. Higgins *et al.*, v. John C. Adams, involving the SW. $\frac{1}{4}$ of Sec. 33, T. 12 N., R. 3 W., of Indian meridian, Oklahoma City, land district.

The record shows that on April 23, 1889, at fifteen minutes after ten o'clock a. m., at the Guthrie land office, John C. Adams made homestead entry No. 9, of said tract of land.

Contests and applications to enter, were filed against Adams's entry by the following parties and in the following order in point of time:

April 24, 1889, Wm. L. Couch's application to enter;

April 27, 1889, Couch's affidavit of contest;

May 2, 1889, R. W. Higgins's application to make soldiers' homestead entry for said tract, and, on the same day he filed his affidavit of contest;

May 18, 1889, John M. Dawson filed his affidavit of contest, and an application to enter;

July 18, 1889, Sarah A. Waynick filed her affidavit of contest;

July 20, 1889, Arren G. Lewis filed his application to enter, and on August 17, 1889, his affidavit of contest;

August 17, 1889, J. W. Davis *et al.*, as townsite claimants, filed contest against Adams's entry and claimed superior rights to the other claimants and contestants;

September 25, 1890, Townsite Board No. 2 filed their petition of intervention in the controversy;

January 15, 1891, John E. Finley *et al.*, as trustees of West Oklahoma, filed what purported to be a copy of "a declaratory statement and affidavit" alleged to have been filed June 5, 1889.

Other persons, at divers times, filed affidavits of contest, applications to make homestead entries for the tract, but they have passed out of the case.

April 21, 1890, William L. Couch died and on July 17, 1890, his widow filed an application to be permitted to make homestead entry as the heir of her husband.

All of the applications to enter were rejected for conflict with Adams's entry, from which some of the parties appealed to your office; thereupon your office ordered a hearing to determine the rights of all parties interested.

The hearing was had before the register and receiver at which the parties appeared and submitted their testimony.

On August 2, 1892, the local officers rendered their decision by which they awarded the land to Dawson.

The Townsite Board, Couch, Lewis, Waynick, Morgan, Higgins and Adams, appealed to your office.

On April 27, 1893, your office affirmed the judgment of the register and receiver. Adams, Couch, Higgins, Waynick, Lewis and the Townsite Board appeal.

The testimony clearly proves that Adams, Couch and Waynick are disqualified from acquiring any interest in the lands by reason of having entered the Territory in violation of law and the President's proclamation. Your decision respecting these parties must be affirmed.

This narrows the controversy down to Higgins, Dawson and Townsite Board No. 2.

Higgins bases his claim under an alleged settlement made at ten minutes after two o'clock in the afternoon of April 22, 1889. Dawson bases his claim under his contest affidavit filed May 18, 1889.

Townsite Board No. 2 is here claiming only as the successor of Davis *et al.*, townsite claimants who filed a contest against Adams's entry on August 17, 1889.

As to Higgins's settlement on the tract, your office found, as a fact, that he reached the land in contest, about ten minutes after two o'clock in the afternoon of April 22, 1889. From a careful examination of the testimony, I am well satisfied that your conclusion in this respect was correct.

The only remaining question to be determined is whether Higgins is disqualified to make entry of the land by reason of his having entered the Territory prior to the time fixed by law and the President's proclamation.

After careful consideration of all the testimony, this Department finds that the following facts are clearly proved:

1. Higgins did not at any time before April 22, 1889, enter upon or occupy any part of the Oklahoma Territory.

2. On April 22, 1889, between the hours of 11 o'clock A. M. and 12 M., he drove his team across the eastern line into a little lake or pond lying within the Territory, about a quarter of a mile west of said line, "where there was water, and a lot of horses and men" testimony of W. C. Troglin, Dawson's witness, pp. 687-688) and watered his horses, and immediately returned to the line and resumed his place in the crowd of persons there who had witnessed his going and return.

3. When Higgins started out to water his horses, some of the crowd shouted: "You're too soon," and some shouted: "He's going after water." And as he returned into the line, Higgins, in answer to witness Bunger, who said "I thought you was making a break," replied: "If I get a home, I will get it right." (Testimony, p. 768.)

4. Higgins remained at the line until 12 o'clock, meridian, and at, or a few moments after that hour, started fairly from the line into the Territory with the rest of the crowd who obeyed the law and the President's proclamation.

5. Higgins drove rapidly, and arrived at the land in contest about ten minutes after two o'clock P. M., and immediately settled upon it; and has ever since continued to hold possession of it, and to reside upon it with his family, and he has made valuable improvements thereon.

6. The existence and location of the little lake or pond aforesaid was well known to the crowd assembled on the line in its vicinity. (Testimony of Wm. Neal, Dawson's witness, page 708.) And on April 22, 1889, certainly, and before that day probably, the water of said lake was used by the people camped there. It was equally accessible to all.

7. After Adams and W. L. Couch and Waynick, Higgins was the first settler, and first applicant for homestead entry. After Couch, he was the first contestant of Adams's entry No. 9.

The land he took is no where near said lake; it is not even shown that the route he took in going to it passed by the lake where he watered his horses.

I do not, therefore, concur in the conclusion reached by your office that his act in entering the Territory, as shown by the record, disqualified Higgins under the statute and proclamation, for I can not believe that the facts in this particular case bring him within the spirit of the prohibition in the act of Congress and the proclamation of the President.

This case does not come within the rule announced in *Kingfisher v. Wood* (11 L. D., 330); *Guthrie Townsite v. Paine et al.* (12 L. D., 653); *ib.*, on review (13 L. D., 562); or *Blanchard v. White et al.* (13 L. D., 66). Nor does it come within the rule announced by the supreme court in *Smith v. Townshend* (148 U. S., 490), as I understand said case.

For the foregoing reasons, your office decision is reversed, the claims of the Townsite Board and settlers, as well as the contests of Dawson *et al.*, are hereby dismissed, and Higgins will be permitted to make entry of the tract in controversy.

DEPUTY UNITED STATES MINERAL SURVEYORS.

CHARLES W. HELMICK.

A resident of a State holding a commission as United States deputy mineral surveyor therein can not act thereunder in another State; nor can such surveyor hold commissions simultaneously in two or more States.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 30, 1894. (F. L. C.)

I am in receipt of your office letter of April 27, 1894, replying to departmental letter of April 23, 1894, requesting a statement as to the interpretation given by your office to section 2334 of the Revised Statutes, so far as the same relates to the appointment of United States deputy mineral surveyors, and the practice thereunder.

The question raised is: Can a person resident of one state hold a commission as United States deputy mineral surveyor and act thereunder in another state?

It comes up in connection with the application of one Charles W. Helmick for a commission as deputy mineral surveyor for Idaho, he being at the time of said application a duly appointed deputy mineral surveyor for Montana, and a resident of that State.

Your office, by letter of February 10, 1894, addressed to the United States surveyor-general for Idaho, held that Mr. Helmick, while a resident of and holding a commission as United States deputy mineral surveyor in Montana, should not be appointed to a similar position in Idaho.

This construction of the law is objected to, and it is contended that it will operate disadvantageously by preventing the employment in many instances of the most expert and skilled surveyors, or of those most convenient to claims to be surveyed.

The question is, not what law is desirable, but what is the law.

Section 2334 of the Revised Statutes provides that:

The surveyor-general of the United States may appoint in each land-district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey.

I understand the holding of your office to be that the word "land-district" as used in the above quotation means one surveyor-general's district, as used in Sec. 2212 of the Revised Statutes, i. e., one State or Territory. I think it is intended to be, as the word indicates, more definite and specific than that. It has a well defined and settled meaning under the law and the practice of the land department. See page

one of General Circular of 1892, and Sec. 2234 Revised Statutes. It means, as there indicated, a district with well defined boundaries established by law, in which is a land office with register and receiver. When a deputy mineral surveyor is appointed he should be commissioned as a resident of a particular land district in his state or territory. This, however, does not confine his duties to that particular land-district, for Sec. 2334, Revised Statutes, a part of which has been quoted herein, after providing for the payment of expenses of surveys of mineral claims by the applicants, further provides: "And they shall also be at liberty to employ any United States deputy surveyor to make the survey." I construe this to mean any deputy mineral surveyor within the jurisdiction of the surveyor-general from whom the commission is held—that is, within the state or territory for which such surveyor-general has been appointed.

This view of the law would inhibit any deputy mineral surveyor from going outside the state or territory in which commissioned to survey mining claims. The reasons for this are obvious. The law contemplates that the appointee shall be under the direction of and answerable to the officer who appointed him, and a surveyor-general in one state can not direct or control surveys in another state.

Neither, under the views herein expressed, can a deputy mineral surveyor hold commissions simultaneously in two or more states, for by the terms of the law he must, as already indicated, be a resident of the state and land-district in which he holds his appointment, and a person can not have two places of residence at the same time.

You will instruct United States surveyors-general to act in accordance with the law as herein interpreted in the matter of granting commissions to United States deputy mineral surveyors.

OKLAHOMA TOWN LOTS—DEPOSITS.

CHILDERS *v.* COLE.

A deed to a town lot issued by a townsite board in obedience to a judicial order terminates departmental jurisdiction in the matter, and the case, therefore, being finally disposed of, the money deposited by the successful party should be returned.

The Department has no interest in determining how costs levied in judicial proceedings shall be paid.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 30, 1894. (F. W. C.)

In your office letter of October 1, 1892, the facts are set forth in the matter of the proceedings had in the case of F. M. Childers *v.* H. B. Cole, involving lots 13 and 14, block 24, Kingfisher, Oklahoma.

From said letter and accompanying papers, it appears that this case was regularly heard by townsite board No. 3, and decision rendered in favor of Childers, from which Cole appealed to your office.

In view of said appeal the townsite board refused to issue patent to Childers and he, thereupon, petitioned the court for a mandamus compelling the issue of patent in accordance with decision of said townsite board in his favor.

An alternative writ issued on said petition requiring the board to show cause, to which no answer was made, and a peremptory writ issued in obedience to which the board issued deed to the lots in favor of Childers.

The costs in said proceedings amounted to more than \$10, and following the decision of the court Childers' attorney made formal demand for the return of the \$100 deposited by Childers as security for the costs of the trial had before said board.

Your office letter presents two questions: first, how shall the costs levied in said proceedings by the court, be paid? second,

inasmuch as the right of appeal to this office and the Department has been awarded in the cases in question, and the parties assured that the money deposited to pay the costs of the trial before the townsite board would be refunded to the parties found to be entitled to the lots in the final determination of the cases, what instructions shall be given the board relative to repayment of such moneys.

For some reason no action appears to have been taken upon your letter of October 1, 1892, and my attention is called thereto by your office letter of March 29, 1894.

It appears that during the pendency of this matter before this Department, the question as to whether an appeal is allowable from the decision of the townsite board in contested lot cases, has been prosecuted to the supreme court of the United States, resulting in the decision of that court under date of November 20, last, as follows:

In our judgment it was entirely within the competency of the Secretary to provide for an appeal in cases of contest, and, as he had done so by the regulations in question, and an appeal had been duly taken thereunder in the case before us, the trustees properly declined to issue the deed, and the mandamus was improvidently awarded, even assuming that the district court had jurisdiction.

McDaid et al. v. Territory of Oklahoma.

It will thus be seen that the decision of the townsite board in contested lot cases is not a finality, but in the case under consideration no answer having been made to the writ issued upon the petition for mandamus, a peremptory order issued under which the lots were deeded to Childers. By the issuance of said deed the land passed beyond the jurisdiction of this Department and said case must be considered as finally disposed of for the purpose of returning the money deposited by Childers, as applied for.

In answer to the question as to how the costs levied in said proceedings by the court shall be paid, I am of the opinion that this is a matter that relates to the execution of the judgment of the court and is

one in which this Department has no interest. It might be stated, however, that the liability is one that is individual, that is, if there is any liability, it was on the officers of the board individually; hence there is no necessity for directions from this Department as to the collection of the same.

INDIAN LANDS—EXECUTIVE WITHDRAWAL.

HENRY F. BRUNE.

An entry, disallowed on account of conflict with the executive withdrawal for the protection of the Yakima Indians in their fishing privileges, may pass to patent, where it appears that the tract in question is not required for the purposes of the withdrawal.

Secretary Smith to the Commissioner of the General Land Office, June 30,
(J. I. H.) 1894. (G. C. R.)

On February 3, 1894 (18 L. D., 38), the Department modified its decision of August 31, 1892 (L. and R., 252, page 169.), which directed the cancellation of Henry F. Brune's pre-emption cash entry for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$; the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 6, T. 2 N., R. 14 E., Vancouver land district, Washington.

The Department in its said decision of February 3, 1894, after setting out fully the facts in the case, directed that a hearing be had before the register and receiver "to determine the true facts relative to the situation of this tract, whether it is in any way necessary to the treaty rights guaranteeing the Indians fishing privileges," etc.

A copy of said decision was transmitted to the Commissioner of Indian Affairs, with directions that an agent of his bureau be present at the hearing and represent the Indian tribe.

I am now in receipt of a letter from Frank C. Armstrong, acting Commissioner of Indian Affairs (copy herewith enclosed), stating that Bernard Arntzen, special allotting agent, was furnished with a copy of said departmental decision and instructed to comply with the orders therein made.

On May 21, 1894, the agent made his report, stating that he had made a full investigation of the matter of the suspension of the pre-emption cash entry of Henry F. Brune, embracing the lands above described, by personal inspection of the lands, and by inquiry among the Indians and others; that from his personal observation, and from reliable information, said lands are situated in the foot hills four miles from the Columbia river; that no Indian trails lead to the river across the lands; that there is a broad public road to the south of the lands leading to the Columbia river; that the lands described can in no way be of any use to any person or persons in facilitating fishing or the curing of fish; that the control and ownership of the same by claimant will in no way interfere with the free access to the Columbia river, or

the fishing privileges or rights reserved by treaty to the Yakima Nation of Indians. He therefore recommends that the rehearing be dispensed with, and that the order suspending the entry of Mr. Brune be revoked.

In view of this report, the Commissioner recommends that the lands covered by Brune's entry be relieved from the order of suspension. In this recommendation I concur.

If no other reasons exist, save the order hitherto made suspending the land from entry, let patent issue.

ABANDONED MILITARY RESERVATION—SETTLEMENT.

WILLIAM G. WINGFIELD.

Acts of settlement prior to January 1, 1884, determine the right of a settler to make homestead entry of lands within an abandoned military reservation.

Secretary Smith to the Commissioner of the General Land Office, April 5,
(J. I. H.) 1894. (A. E.)

In this matter Wingfield appeals to the Department from your office decision of November 17, 1892, rejecting his application to make homestead entry of lots 3 and 4, Sec. 15 and lots 2 and 3, Sec. 15, T. 15 N., R. 5 E., Prescott, Arizona.

The ground for your office decision was that a portion of the land was within the Fort Verde Garden reservation, and Wingfield's application did not show that he had established residence prior to January 1, 1884, which was necessary to entitle him to the remedial provisions of the act of July 5, 1884 (23 Stat., 103).

The Fort Verde Garden tract was established by executive order on October 24, 1871, as a garden for Camp Verde, which it joins on the south. It was relinquished and transferred to the Interior Department on July 22, 1884. On March 24, 1890, it was surveyed and the survey accepted. It contains 2,985.82 acres.

On July 5, 1884, Congress passed an act entitled "An act to provide for the disposal of abandoned and useless military reservations." It is provided in the second section of this act as follows:

That any settler who was in actual occupation of any portion of any such reservation, or settled thereon prior to January first, eighteen hundred and eighty-four, in good faith, for the purpose of securing a home and of entering the same under the general land laws, and has continued in such occupation, to the present time, and is by law entitled to make homestead entry, shall be entitled to enter the lands occupied, not exceeding one hundred and sixty acres in a body, according to the government surveys and subdivisions.

In transmitting the appeal now under consideration, the register states that Wingfield has manifested good faith, and, though his actual residence did not begin until a few days after January 1, 1884, he had had possession of the land since December, 1883.

Wingfield's appeal is sworn to and corroborated by two witnesses. In it he states that the portion of the land lying within the Garden reservation has been occupied for twenty years and during a portion of the time when it was held in reserve, but that it was never used by the military authorities; that appellant purchased the improvements on said land in December, 1883, and thereupon took possession, and has held and cultivated it ever since; that he moved on the land about January 15, 1884, and that he and his family have resided upon it continuously since February, 1884; that he has improvements on the land valued at \$3,000.

As it has become a settled doctrine that the act of settlement dates from the instant the settler goes upon the land with the intention of making it his home and performs some act indicative of such intent, the purchase of the improvements, and possession by Wingfield, in December, 1883, brings him within the provisions of the act as a settler prior to January 1, 1884, and therefore entitled to make homestead entry of the land. You will accordingly accept his application, if otherwise qualified.

PUBLIC SURVEYS—MAXIMUM RATES.

STATE OF IDAHO (On Review).

Payment of the maximum rates allowed for public surveys should not be refused where the contract therefor was authorized by the Department on due showing as to the character of the lands to be surveyed.

Secretary Smith to the Commissioner of the General Land Office, June
(J. I. H.) 27, 1894. (W. F. M.)

In March, 1891, the United States surveyor general for the State of Idaho transmitted to your office the applications, petitions and affidavits of the settlers in certain several townships of that State praying for the survey of the same.

The surveyor general, in a letter to your office of March 28, 1891, says:

It is impossible to contract for surveys in that section of the country at the minimum (\$9, \$7, and \$5) and intermediate (\$13, \$11, and \$7) rates allowed by law, the lands being mostly more or less mountainous and covered with heavy timber and brush. The land in Latah and Kootenai counties are in fact identical with those in the State of Washington where the maximum rate per mile is allowed by act of Congress.

Influenced by these representations, by letter "E" of April 8, 1891, it was recommended to this Department that your office be—

Authorized to instruct the United States Surveyor General for Idaho to award to competent and reliable surveyors contracts for the survey of the townships herein named at rates of mileage not to exceed the minimum (\$9, \$7 and \$5) and the maximum (\$18, \$15 and \$12) allowed for public surveys by the act of August 30, 1890, the latter rates to apply only where the lines of survey shall pass over lands that are mountainous, heavily timbered, or covered with dense undergrowth.

Responding to this recommendation the Department, on April 11, 1891, addressed a letter to your office, the particular phraseology of which seems to have an important bearing upon the questions at issue, and so much thereof as appears necessary is here transcribed as follows:

The Department is in receipt of your letter of the 8th instant enclosing communication dated the 28th ultimo from W. H. Pettit, U. S. surveyor general for Idaho, with accompanying diagram; also petitions and affidavits from a large number of settlers in certain described townships in Latah, Kootenai and Nez Perces counties, in Idaho.

In view of the facts set forth you are hereby authorized to direct the surveyor general to contract for the survey of the tract described in the townships named, etc.

Acting under the authority thus given, Willis H. Pettit, U. S. surveyor general for Idaho, on April 25, 1891, contracted with Oscar Sonnenkalb and John A. Long for the survey of certain of the townships described in the petitions of the citizens. a more particular description of which it is not necessary to insert here. The contract thus made is numbered 130, and was approved by your office on May 18, 1891.

Accompanying your letter of August 25, 1893, your office transmitted to this Department a duplicate of the contract and bond, and detailed account of the cost of the execution of the same, and requested authorization for the payment of the account at the maximum rates of \$18, \$15 and \$12 per mile.

On October 17, 1893, the Department rendered a decision holding that the act of August 30, 1890, 26 Statutes, 389—

Only authorized the payment of the maximum rates (\$18, \$15 and \$12) per linear mile for lines passing over lands heavily timbered, mountainous, or covered with dense undergrowth, in the States of Oregon and Washington, as will be seen by an examination of the text of the act. Only the intermediate rates (\$13, \$11 and \$7) could be allowed for the survey of that class and character of the public lands outside of the said States of Oregon and Washington. The maximum rates (\$18, \$15 and \$12) per linear mile under the act of August 30, 1890, could be allowed in other States only where the lines of survey extended over lands heavily timbered, mountainous, or covered with dense undergrowth, and, in addition, combining "exceptional difficulties" in the surveys, and where the work can not be contracted for at the intermediate rates.

It was decided, however, that, "inasmuch as your office was directed and authorized by this Department to award a contract at the rates in question," those rates would be allowed for such townships as were specifically named and described in your office letter of April 8, 1891, by which the matter was first brought to the attention of the Department, but disallowed as to all other townships embraced in the contract.

The contractors, Sonnenkalb and Long, are now here asking for a review of the decision first rendered, and for allowance of the maximum rates stipulated in the contract. Accompanying the motion are the affidavits of Oscar Sonnenkalb, one of the contractors, of Willis H. Pettit, the former U. S. surveyor general for Idaho, and of F. J. Mills,

a U. S. deputy surveyor, all to the general effect that the survey of the lands embraced in the contract involved "exceptional difficulties."

Upon reconsideration, after a very careful examination of the record, I am satisfied that departmental decision of October 17, 1893, is erroneous. The representation of the U. S. surveyor general for Idaho to your office, and through your office to this Department, that it was "impossible to contract for surveys in that section of the country at the minimum and intermediate rates allowed by law," furnished ample warrant for the authorization of the contract at the maximum rate, and, in view of the re-examination which I have given the matter, it is absolutely clear to my mind that my predecessor, Mr. Secretary Noble, intended to authorize, and in fact did authorize the contract at that rate.

"In view of the facts set forth," it is said in departmental letter of April 11, 1891, to your office:

You are hereby authorized to direct the surveyor general to contract for the survey of the tracts described in the townships named, at rates of mileage not to exceed the minimum rates for ordinary lands, and not to exceed the maximum rates where the lines of survey shall pass over lands that are mountainous, heavily timbered, or covered with dense undergrowth.

When this letter was written the writer had before him the petitions and affidavits of the settlers describing the townships, and diagrams thereof, and it is too clear for argument that it was conceived and indited with reference to these accompanying documents which alone supplied the basis of the action taken. Manifestly, the evidence upon which the authority was given was found, not in your office letter of April 8, 1891, but in its inclosures, to wit, the communication of the surveyor general for Idaho declaring it to be impossible to make the contract at rates other than the maximum, the diagrams of the townships, and the petitions and affidavits of the settlers.

These diagrams, petitions and affidavits embrace all the lands involved in contract No. 130, and this Department, therefore, must be held to have authorized that contract in its entirety at the rates stipulated therein.

Departmental decision of October 17, 1893, rendered in this matter, is, therefore, hereby revoked, and it is now ordered that rates be allowed according to the terms of the contract, that is to say, \$9, \$7 and \$5 for ordinary lands, and \$18, \$15 and \$12 where the lines of survey pass over lands that are mountainous, heavily timbered, or covered with dense undergrowth.

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